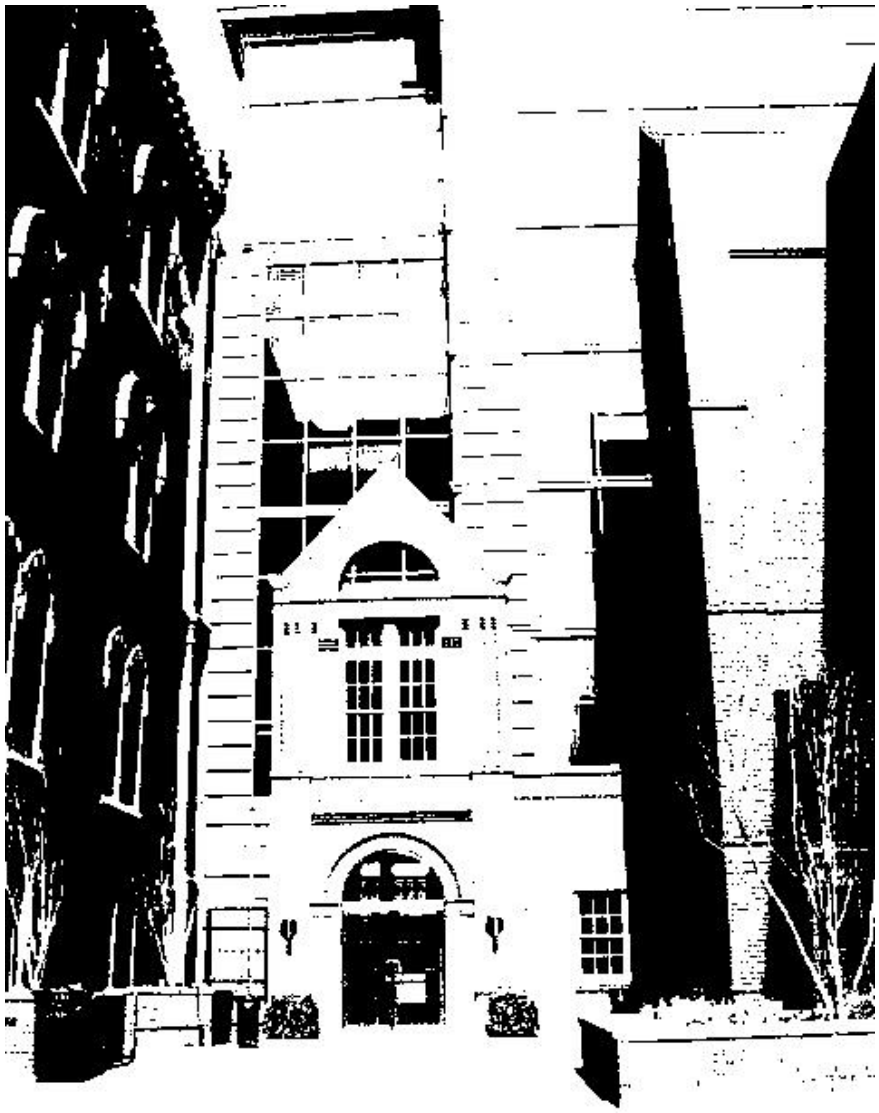
Merit Systems Protection Board



Annual Report
Fiscal Year 2001

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Fiscal Year 2001 in Review

COMINGS AND GOINGS

The Merit Systems Protection Board began Fiscal Year 2001 as it ended Fiscal Year 2000—with an Acting Chairman at the helm of the agency and a vacancy on the three-member Board yet to be filled. Before the end of the first quarter of the new fiscal year, however, the Acting Chairman had become Chairman, and the Board was once again at full strength.

Following the adjournment of the 106th Congress, President Clinton on December 22, 2000, appointed Acting Chairman (and then Vice Chairman) Beth S. Slavet to serve as Chairman of the Board. On December 27, 2000, President Clinton filled the vacancy on the Board through his appointment of Barbara J. Sapin as a member of the Board and designated her to serve as Vice Chairman.

The new Vice Chairman and her staff arrived in early January 2001, as did a new General Counsel—the first political appointee to serve in that position—and a new Regional Director for the Western Regional Office. At the same time, the Board said farewell to two retiring headquarters office directors—the Chief Administrative Law Judge and the Director, Office of Regional Operations. By the end of 2001, three more office directors were preparing to retire, and January 2002 would see the departure of the Clerk of the Board, the Director of Policy and Evaluation, and the Regional Director of the Northeastern Regional Office. Bringing home the impact of the coming wave of retirements in the Federal Government, several other staff members announced plans to retire at the beginning of January 2002.

To assist in dealing with the effects of these retirements, the Chief of Staff required all office directors to address succession planning in their annual business plans. Planning for projected retirements was also addressed in the Workforce Analysis and Workforce Restructuring Plan submitted to the Office of Management and Budget at the request of the Bush Administration and was a major discussion topic at the MSPB Senior Staff retreat at the beginning of October 2001.

ADJUDICATION OF CASES

During FY 2001, the Board continued to address the full range of both substantive and procedural issues that arise in the matters over which it has jurisdiction. It issued a number of significant decisions, which are summarized in the section of this report titled "Significant Decisions of the Board." The Board's principal reviewing court, the U.S. Court of Appeals for the Federal Circuit, also issued several important precedential opinions during the fiscal year, which are summarized in the section titled "Significant Court Decisions."

The MSPB regional and field offices maintained their excellent record of case processing timeliness in FY 2001, with

an average processing time of 92 days. In addition, the rate at which initial appeals are settled by administrative judges increased to 57 percent of cases that are not dismissed—the highest settlement rate in any fiscal year since the Board launched its first settlement program in the mid-1980s.

At headquarters, the Board members and the legal offices continued to focus on reducing the number of overage cases, targeting cases that had been pending for more than 300 days. By the end of the fiscal year, the Board had reduced the number of such cases to 45—a substantial reduction from the 92 cases pending for *more than one year* at the end of FY 1999. Because closing older cases has the effect of increasing average case processing time, the average time to process petitions for review (PFRs) at headquarters increased to 214 days in FY 2001.

With the departure of the Chief Administrative Law Judge in January 2001, the Board decided to look into the feasibility of using other available legal resources to adjudicate cases that must be heard by an ALJ, rather than filling the vacant position. These cases consist primarily of complaints brought by the Special Counsel (including Hatch Act cases) and proposed agency actions against administrative law judges. In March 2001, the Board entered into an agreement with the National Labor Relations Board (NLRB) under which these cases are assigned to ALJs at that agency for adjudication. The NLRB judges issue initial decisions in the assigned cases, which are subject to a petition for review by the 3-member Merit Systems Protection Board. The original agreement was to end September 30, 2001, but the program has been so successful that the agreement was renewed for FY 2002.

The Alternative Dispute Resolution (ADR) Working Group, established by Chairman Slavet in the previous fiscal year, continued its work in FY 2001. The Group has a twofold purpose—to explore ways in which the Board can expand its existing ADR program with respect to appeals *after* they are filed with the MSPB, and to prepare for the eventual enactment of legislation authorizing the Board to conduct a voluntary early intervention ADR pilot program to try to resolve certain personnel disputes *before* they result in a formal appeal. (See below under "LEGISLATIVE ACTION.") At the end of FY 2001, upon the recommendation of the ADR Working Group, the Board entered into a contract with two ADR experts, who were the primary designers of the successful Postal Service REDRESS program, to develop a proposal for expanding the Board's use of ADR techniques and to conduct mediation training. Initial training is scheduled to begin by February 2002.

During the fiscal year, the Board completed evaluations of four pilot programs aimed at improving MSPB adjudicatory procedures. The evaluation of the results of the survey of participants in cases where bench decisions were issued or hearings were held by video conference (reported in the FY 2000 Annual Report) showed that both of these pilot programs, launched in 1998, had been successful. The issuance of bench decisions allows cases to be closed more quickly, and video hearings result in cost savings for both the parties

and the Board. Both bench decisions and video hearings have now been incorporated into the Board's standard adjudicatory procedures.

The suspended case pilot program launched in November 1999 (reported in the FY 2000 Annual Report) was also evaluated in FY 2001. Under this program, if the parties to an appeal mutually request a 30-day suspension to pursue discovery and settlement efforts, the administrative judge will grant it, without requiring the parties to provide evidence and argument to support the request. A second 30-day suspension will be granted if the parties agree that further time is necessary. A recommendation to make the suspended case procedure permanent was submitted to the Board in FY 2001 and was approved early in FY 2002. The Board directed that public comments be solicited when publishing an amendment to the Board's adjudicatory regulations to incorporate the suspended case procedure.

Finally, an evaluation of the expedited petition for review pilot program at headquarters was submitted to the Board near the end of FY 2001, with a recommendation that the program be made permanent. The purpose of the program (reported in the FY 2000 Annual Report) is to identify non-meritorious PFRs that can be disposed of quickly so that the 3-member Board can focus its resources on complex and precedential cases. During FY 2001, PFRs selected for the expedited program were closed in an average of 54 days, compared to an average of 236 days for PFRs that were not selected for the program.

The Board published three amendments to its adjudicatory regulations during FY 2001. The first amended Appendix II to 5 CFR Part 1201 to reflect the relocation of the MSPB Washington Regional Office to Alexandria, Virginia (65 FR 58902, October 3, 2000). The second amended the procedural rules for whistleblower appeals (5 CFR Part 1209) to allow an appellant to satisfy the Board's requirements for providing details of the protected disclosures and personnel actions raised in the appellant's complaint to the Special Counsel by filing Part 2 of the revised OSC Complaint Form, OSC-11 (65 FR 67607, November 13, 2000). The last amended 5 CFR Part 1201 to make several technical changes, including conforming certain citations in the Board's regulations to revised regulations of the Office of Personnel Management (66 FR 30635, June 7, 2001).

MERIT SYSTEMS STUDIES

During FY 2001, the Board issued one report of a merit systems study conducted by its Office of Policy and Evaluation (OPE) and four editions of the *Issues of Merit* newsletter. The report evaluated the Presidential Management Intern (PMI) program, which was established to attract master's graduates in public sector management to careers in Federal service. Findings from the Merit Principles Survey 2000 (to be issued as a full report in FY 2002) were released through several editions of the *Issues of Merit* newsletter. The PMI report, the findings from the Merit Principles Survey that were released in FY 2001, and other topics covered in the *Issues of Merit* newsletter, are

summarized in the section of this report titled "Merit Systems Studies."

The Office of Policy and Evaluation also completed work on three other merit systems studies during the fiscal year and submitted the reports to the Board for approval. All three were approved early in FY 2002 and were scheduled for release over the next several months. These reports are: (1) *The Office of Personnel Management in Retrospect: Achievements and Challenges After Two Decades;* (2) *The Federal Merit Promotion Program: Process vs. Outcome;* and (3) *Assessing Federal Job-Seekers in a Delegated Examining Environment*.

The OPE staff also continued to serve as a valuable resource for the Board in meeting internal agency research needs. The office plans customer satisfaction surveys with respect to both adjudication and the merit systems studies program in FY 2002.

LEGISLATIVE ACTION

Two significant pieces of legislation that would affect the Board's adjudicatory program were considered in the first session of the 107th Congress. The first was the Whistleblower Protection Act Amendments of 2001 (S. 995), introduced by Senator Daniel K. Akaka (D-HI), Chairman of the Subcommittee on International Security, Proliferation and Federal Services of the Senate Governmental Affairs Committee. A companion House bill, H.R. 2588, was subsequently introduced by Rep. Constance Morella (R-MD).

Chairman Slavet testified at the hearing on S. 995 held by Sen. Akaka's subcommittee on July 25, 2001. While she advised the subcommittee that the Board, as a neutral third-party adjudicatory body, would take no position on the bill, she offered several observations on its probable impact. She noted that the clarifications of whistleblower protections proposed by the bill could be expected to result in more disclosures being protected. As a result, the Board would expect its whistleblower appeals caseload to increase and also would expect that more whistleblower appeals would receive a full adjudication on the merits, rather than being dismissed for lack of jurisdiction.

Chairman Slavet also addressed other provisions of S. 995 that would have a direct impact on the Board, including the provision authorizing the Special Counsel to seek judicial review of final Board decisions in whistleblower and Hatch Act cases and the provision allowing appellants and the Director of OPM to seek judicial review of Board decisions in the regional circuit courts of appeals, rather than only in the United States Court of Appeals for the Federal Circuit.

Following the hearing, the Board responded to additional questions from the subcommittee and provided requested statistical information about whistleblower appeals. Both the Senate and House versions of the Whistleblower Protection Act Amendments remained pending at the end of the year.

The other legislative proposal that would directly affect the Board is H.R. 1965, introduced by Rep. George Gekas (R-PA). This bill, a modified version of

a bill introduced by Rep. Gekas in the 106th Congress (H.R. 3312) and passed by the House, would authorize the Board to conduct a 3-year pilot program to test the use of voluntary alternative dispute resolution in the early stages of certain personnel disputes—that is, *before* the dispute results in a formal appeal to the Board. There was no formal legislative action on the bill, which would also authorize a new pay schedule for MSPB administrative judges, by the end of the year.

With the current authorization for the Merit Systems Protection Board due to expire at the end of FY 2002, the Board also began the reauthorization process in FY 2001. As required by law, the Board submitted proposed reauthorization legislation to its House and Senate authorizing committees in May 2001. There was no formal legislative action in the first session of the 107th Congress, but the Board expects reauthorization legislation to be introduced and considered in the second session.

OUTREACH AND PUBLIC INFORMATION

The Board continued its emphasis on outreach during FY 2001, participating in approximately 180 outreach events. The Board members and attorneys from the headquarters legal offices, as well as administrative judges from the regional and field offices, participated in conferences and addressed groups representing both employees and agency management. Topics included updates on recent significant decisions of the Board and the U.S. Court of Appeals for the Federal Circuit, Board procedures and regulations, and various substantive areas of the law applied by the Board. There was particular emphasis on the Board's ADR initiatives in the outreach events of FY 2001. In addition, a number of mock hearings were held.

The OPE staff maintained an active outreach program to increase the impact of the Board's merit systems studies. OPE staff participated in interagency or intergovernmental discussions and provided presentations on a full range of human resources management issues and topics that have been the subject of MSPB reviews.

So that all employees, both in headquarters and the regional and field offices, are aware of outreach appearances by other employees, the Board maintains an electronic Outreach Calendar that is available to the entire staff at any time. Use of the Outreach Calendar avoids scheduling conflicts and enables employees who are addressing the same or similar topics to discuss their presentations with each other.

The Board also took a number of steps in FY 2001 to enhance its public information programs. In particular, a video in which MSPB employees describe the appeals process was completed during the fiscal year and released (in both videotape and CD-ROM formats) early in FY 2002. The Board's public information publications were also updated, and new "fill-in" versions of the MSPB Appeal Form and the Petition for Review Form were posted to the MSPB Web site (www.mspb.gov). The Board also began the process—which it expects to complete by January 2002—of adding key precedential decisions issued between 1979 and 1994 to the decisions database on its Web site; previously,

only decisions issued since the Web site was launched in 1994 have been available. Testing of two list servers (listservs) for the Web site was in the final phase at the end of the fiscal year, and the listservs were implemented early in FY 2002. One listserv allows individuals to subscribe to receive Board decisions when they are posted to the Web site, while the other provides notification to subscribers when a new merit systems study is released.

AFTERMATH OF SEPTEMBER 11TH

The Board and its employees ended FY 2001—like all Americans—in a state of shock over the devastation caused by the terrorist attacks of September 11th. Even while the thoughts of everyone at the MSPB were with those lost in the attacks and with their families and friends, steps had to be taken within a matter of days to deal with practical matters in case processing affected by the attacks.

The Board's New York Field Office, just a few blocks from the World Trade Center, was evacuated following the attack in New York and remained closed for several weeks. Fortunately, all MSPB employees there were unharmed. The Board's headquarters in Washington closed soon after the attack on the Pentagon, and other MSPB offices throughout the country closed early that day. Telephone service was disrupted in New York, circuits were overloaded in Washington, and mail pickup and delivery were affected throughout the country.

Each of these factors impacted the daily sending and receiving of documents in the process of adjudicating cases both at Board headquarters and in the regional and field offices. Therefore, the Board quickly implemented several variations in normal case processing procedures in the aftermath of the attacks and announced the policy through a press release, a posting on its Web site, and a notice published in the *Federal Register*.

Under this policy, all filings due to the New York Field Office were to be made instead to the Northeastern Regional Office in Philadelphia until the New York office reopened (which it did in October). Administrative judges in the regional and field offices were to exercise discretion in accepting filings due on September 11th that were made after that date. At headquarters, the Clerk of the Board was to exercise similar discretion with respect to filings made there. Finally, where case files were destroyed in the attacks—as was the case with several Federal agencies in the World Trade Center—appropriate continuances were to be granted until the case files could be reconstructed, and MSPB offices would assist in the reconstruction of such files.

As FY 2001 ended, these variations in procedures were being applied by the Board and its judges so that no party to a MSPB proceeding would be adversely affected by the events of September 11th. Only a few weeks into FY 2002, however, the Board was presented with a new challenge as a result of the discovery of anthrax-contaminated mail in Washington, DC, and New York.

With the sudden closing of Washington's main mail sorting facility, and the decision to stop delivery of mail to Federal agencies until it could be

treated, the Board's headquarters had no incoming mail for a 4-week period. Even after mail delivery was resumed, only a few filings were received each day. In the meantime, the FAX machine in the Office of the Clerk of the Board worked overtime receiving facsimile filings. Mail service to the New York Field Office was also disrupted, as a result of both the September 11th attacks and the anthrax-by-mail incidents. The Board's ability to send case documents from its offices was also affected because, even after mail delivery to Federal agencies resumed, several agencies advised the Board that they would no longer accept documents sent by mail and asked that they be sent by facsimile or e-mail instead.

These events ensured that business at the Board would not be "business as usual" in FY 2002. Despite the adjustments that had to be made in the aftermath of September 11th and the anthrax-by-mail incidents, and with the need to accommodate the changes in personnel that will occur both on the Board and among the career staff in FY 2002, MSPB employees stand ready to meet the challenges that lie ahead and pledge to continue their proud tradition of outstanding service to the Board's customers.

As noted in last year's Annual Report, this publication is no longer required by statute but is published as a service to the Board's customers. (The statutory requirement for an annual report was "sunset" by the Federal Reports Elimination and Sunset Act, Public Law 104-66, as amended by Public Law 106-113.) The Annual Report is intended to be a companion to the annual Performance Report required by the Government Performance and Results Act. The FY 2001 Performance Report will be issued on or before March 31, 2002, and will contain additional information regarding the Board's achievements in FY 2001.

Board Members

CHAIRMAN

BETH S. SLAVET was appointed Chairman of the Merit Systems Protection Board by President Clinton on December 22, 2000. From August 15, 1995, following her nomination by President Clinton and confirmation by the Senate, she served as Vice Chairman of the Board. Additionally, she served as Acting Chairman from March 3, 2000, until her appointment as Chairman. Her term appointment to the Board expires March 1, 2002. Ms. Slavet served as Labor Counsel to the Committee on Labor and Human Resources of the U.S. Senate from March 1993 until January 1995. Previously, she was Legislative Counsel and Staff Director for U.S. Representative Chester Atkins (D-MA). From 1984 to 1992, Ms. Slavet practiced employment and labor law in Washington, DC. Prior to that, she served as the staff attorney to the American Federation of Government Employees Local 1812 in Washington, DC. She is a graduate of Brandeis University and received her J.D. degree from the Washington University School of Law. She is admitted to the District of Columbia Bar and is a member of the Federal Circuit and District of Columbia bar associations.

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

VICE CHAIRMAN

BARBARA J. SAPIN was appointed as a member and Vice Chairman of the Merit Systems Protection Board by President Clinton on December 27, 2000. From 1995 until the time of her appointment, she served as General Counsel to the American Nurses Association (ANA). Previously, Ms. Sapin served as ANA's Labor Counsel from 1990 to 1995. From 1981 to 1990, she held several positions at the National Labor Relations Board, including attorney for the Appellate Court Branch, Washington, DC; field attorney in the Chicago Regional Office; and Senior Counsel to a Board member in Washington, DC. Ms. Sapin received her B.A. in Psychology from Boston University and her J.D. from Columbus School of Law, Catholic University of America. She is admitted to the District of Columbia Bar.

MEMBER

SUSANNE T. MARSHALL was sworn in as Member of the Board on November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2004. From December 1985 until her appointment, she served on the Republican staff of the Committee on Governmental Affairs of the United States Senate as both Professional Staff and Deputy Staff Director. While on the committee staff, she was responsible for a variety of legislative issues under the committee's jurisdiction, including Federal workforce policies, civil service matters, and postal issues. In addition, she reviewed and processed all nominations under the jurisdiction of the committee. From 1983 to 1985, Ms. Marshall was Republican Staff Assistant to the House Government Operations Committee. She was Legislative Assistant to a Member from Georgia from 1981 to 1982. Ms. Marshall attended the University of Maryland branch campus in Munich, Germany, and the American University.

Board Organization

The **Chairman**, **Vice Chairman**, and **Member** adjudicate the cases brought to the Board. The **Chairman**, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff.

The **Office of Regional Operations** oversees the five MSPB regional offices (including five field offices), which receive and process initial appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

The **Office of the Administrative Law Judge** adjudicates and issues initial decisions in Hatch Act cases, corrective and disciplinary action complaints brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board.

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in all other cases decided by the 3-member Board, except for those cases assigned to the Office of the General Counsel. The office also conducts the Board's petition for review settlement program, processes interlocutory appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's Library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages the Board's records and directives system, legal research programs, and the Government in the Sunshine Act program.

The **Office of the General Counsel**, as legal counsel to the Board, provides advice to the Board and MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. The office also conducts the Board's ethics program and plans and directs audits and investigations.

The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office also conducts an outreach program and

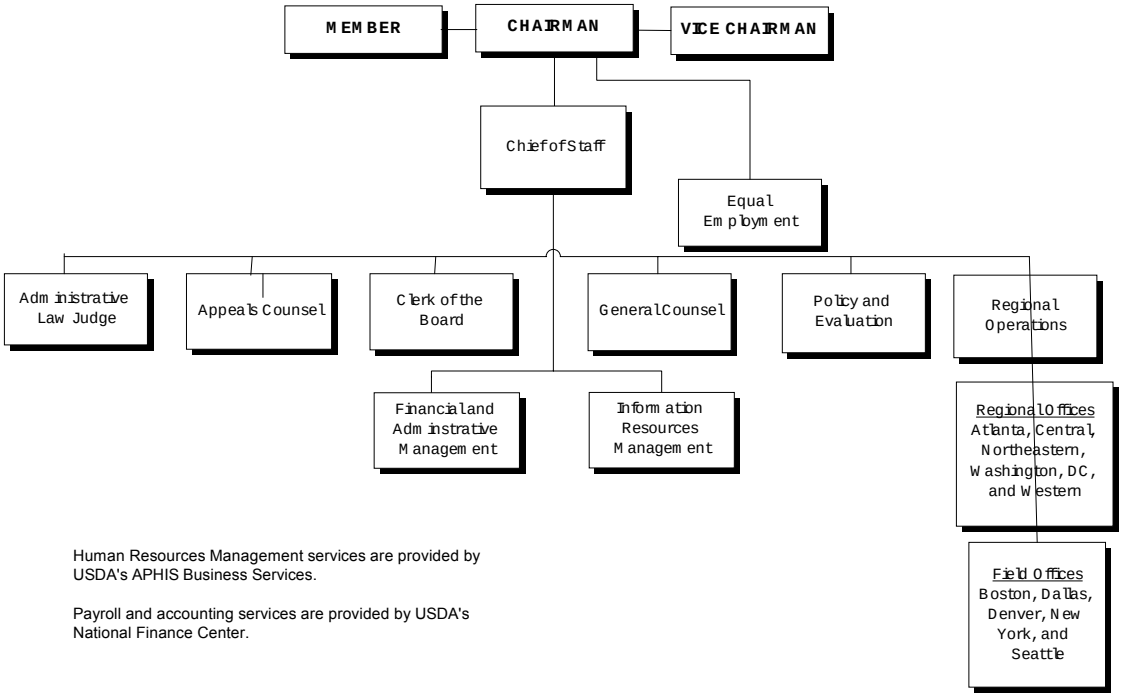
responds to requests from Federal agencies for information, advice, and assistance on issues that have been the subject of Board studies.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

The **Office of Financial and Administrative Management** administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agencywide. It also administers the agency's cross-servicing arrangements with the U.S. Department of Agriculture's National Finance Center (NFC) for payroll and accounting services and APHIS Business Services for human resources management services. (Starting in June 2002, accounting services will be provided by the Bureau of the Public Debt.)

The **Office of Information Resources Management** develops, implements, and maintains the Board's automated information systems to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

Merit Systems Protection Board



Human Resources Management services are provided by USDA's APHIS Business Services.

Payroll and accounting services are provided by USDA's National Finance Center.

Significant Decisions of the Board

ADVERSE ACTIONS – GENERAL

Jones v. Department of Housing & Urban Development, **87 M.S.P.R. 269 (2000)**

Agencies have an obligation to file a disability retirement application on behalf of an employee under the circumstances set out in 5 CFR 844.202. Further, in *French v. Office of Personnel Management*, 37 M.S.P.R. 496, in disability retirement appeals, the Board set forth procedures that must be followed as to apparently incompetent appellants. Here, in an adverse action appeal, the Board found that the administrative judge should inquire into whether the agency had any obligation to the appellant to file on her behalf. It then directed that if the agency is found to have that duty, procedures like those in *French* should be applied. Specifically, the agency and OPM should join in a "cooperative undertaking" so that the appellant's rights are not impaired on account of her possible incapacity. However, the decision did not determine whether the appointment of counsel should generally be required in adverse action appeals or reverse precedent holding *French* procedures inapplicable to adverse action appeals.

Cross v. Department of the Army, **89 M.S.P.R. 62 (2001)**

An agency need not affix any label to its charges, but if it does so, it must prove the elements that make up its legal definition. It may, instead, use a broad label as long as the reasons for the proposed action are described in sufficient detail. Thus, that it used the words "falsified" and "falsely" in the narrative of a "conduct unbecoming" charge does not require it to prove the specific intent element for falsification under the requirements of *Naekel v. Department of Transportation*, 782 F.2d 975. However, in such a "conduct unbecoming" charge, intent remains relevant to assessing the reasonableness of the penalty. The Board also found that a charge of "false statements - deliberate misrepresentation of material fact" covers not only untrue statements, but also those that deliberately conveyed a misleading impression, and it defined "material" in that context.

Gribcheck v. United States Postal Service, **87 M.S.P.R. 473 (2001)**

The Board sustained the appellant's removal for failure to submit to a psychiatric fitness for duty examination. Although the general rule is that an employee must obey an agency order and then protest its propriety later, the Board has held that this rule does not apply to a refusal to submit to an unauthorized psychiatric fitness examination. Here, the Board considered the rule in a case in which the Postal Service was the acting agency, because it is unclear whether the regulations applicable to fitness exams, at 5 CFR Part 339, apply to the USPS. It noted that 39 U.S.C. § 1005(a)(2) gives a USPS preference eligible "only the

rights granted to veterans by the Veterans' Preference Act." Since the right to refuse an examination is not enumerated in the Veterans' Preference Act, the Board concluded that the USPS is not subject to the requirements of 5 CFR Part 339. The agency's Employee and Labor Relations Manual controls instead.

Wiley v. Department of Justice, **89 M.S.P.R. 542 (2001)**

This decision examined the law concerning searches of an employee's private property conducted on agency premises. Searches by Government employers of the private property of their employees are subject to the restraints of the Fourth Amendment, and a Federal employee's Fourth Amendment rights are implicated if his employer has "infringed an expectation of privacy that society is prepared to consider reasonable." A search is considered reasonable if the property owner consented to it; consent may be inferred from nonverbal actions. The test for whether there are "reasonable grounds" for a search of a Federal employee's property, as set out in *O'Connor v. Ortega*, 480 U.S. 709, was applied here to the case of an employee of a correctional institution when the agency sought to search for a loaded weapon in his vehicle in the agency's parking lot, did so, and turned up nothing. The record showed that after being notified of the search, the appellant got into his vehicle and drove off, returned later, and only then permitted the search. The Board held that the search was reasonable and based on a "reasonable suspicion." Moreover, the agency also had reasonable grounds for suspecting that a search was necessary for non-investigative work-related purposes because it had a legitimate interest in ensuring that no unauthorized weapons were being stored in vehicles parked on the lot.

ADVERSE ACTIONS – PENALTY ISSUES

Omites v. United States Postal Service, **87 M.S.P.R. 223 (2000)**

An agency's "zero tolerance" policy alone is insufficient reason not to consider other *Douglas* factors in setting a penalty for proscribed conduct. Thus, where the deciding official failed to give appropriate consideration to the relevant *Douglas* factors, the Board will not defer to his penalty selection.

Mingledough v. Department of Veterans Affairs, **88 M.S.P.R. 452 (2001)**

This case discusses an exception to the general rule that evidence that an employee's medical condition played a part in the charged conduct is a significant mitigating factor. Specifically, the Board found that is not so in the absence of evidence that the impairment can be remedied or controlled, i.e., when the potential for rehabilitation is poor. In addition, the case held that an agency's failure to state in its notice of proposed removal that it will rely on an appellant's past disciplinary record is sufficient to prevent consideration of that disciplinary record by the deciding official or by the Board, and that this is an issue of due process at the agency level, so that the fact that the appellant addressed his past discipline before the Board does not remedy the agency's failure.

ATTORNEY FEES

Santella & Jech v. Special Counsel, Internal Revenue Service & Office of Personnel Management, **90 M.S.P.R. 172 (2001)**

Upon the request for reconsideration filed by the Director of OPM of the decision at 86 M.S.P.R. 48 (2000), the Board reaffirmed that attorney fees may be awarded under 5 U.S.C. § 1204(m) to a substantially innocent employee. That section of the law addresses disciplinary actions brought by the Special Counsel. The Board cautioned, however, that it did not thereby suggest that it will automatically apply every interpretation of the interest of justice standard under 5 U.S.C. § 7701(g) to cases under section 1204(m)(1).

Sacco v. Department of Justice, **90 M.S.P.R. 37 (2001)**
Nichols v. Department of Veterans Affairs, **89 M.S.P.R. 554 (2001)**

The appellant must be a prevailing party in order to be entitled to an attorney fee award. The Board, in accordance with the majority of the circuit courts that had examined the issue, had previously awarded fees under the catalyst theory, which allows an award based on a defendant's voluntary change in conduct, without judicial sanction. However, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 531 U.S. 1004, the Supreme Court rejected that theory as a basis for an award and held instead that an enforceable judgment on the merits or a court-ordered consent decree is necessary for "prevailing party" status and an award of attorney fees. Accordingly, in these appeals, the Board found that there is no basis for distinguishing "prevailing party" under 5 U.S.C. § 7701(g)(1). It therefore overruled Board cases relying on the catalyst theory for awarding fees, including *Joyce v. Air Force*, 83 M.S.P.R. 666, and followed the Supreme Court's decision. Applying the new rule to the instant cases, the Board held that because the appellants' appeals on the merits were dismissed as moot when the agencies unilaterally rescinded the actions appealed, they were not prevailing parties and were not entitled to fee awards.

BACK PAY

Morman v. Department of Defense, **90 M.S.P.R. 197 (2001)**

If the appellant is unable to work because of an accident or illness closely related or due to interim employment or because of the unlawful discharge, the period of disability should be included in her back pay period. Case law suggests that, if the EEOC determined that the appellant's work-related disability was related to unlawful discrimination, it would find that the agency improperly limited her relief by denying reinstatement and "lost wages" for the period during which she was unable to work. The Board remanded the case for inquiry into whether the "lost wages" award by

EEOC equates to the same *status quo ante* relief the Board would award under the Back Pay Act.

DISCRIMINATION ISSUES

Bullock v. Department of the Air Force, **88 M.S.P.R. 531 (2001)**

This decision adjudicates an allegation of "perceived" discrimination and a general claim of disability discrimination. It applies the most recent Supreme Court precedent on disability discrimination issues and provides a general overview of the subject. Among other points, it finds that the first step in adjudicating a claim of "perceived" disability discrimination is to determine whether the agency mistakenly believed that an actual non-limiting impairment substantially limited one or more of the appellant's major life activities. Further, it states that to be substantially limited in the major life activity of working, one must be precluded from more than one type of job, a specialized job, or a particular job of choice, so that a situational limitation involving one particular location and supervisor does not meet the test.

Carter v. Department of Justice, **88 M.S.P.R. 641 (2001)**

This case addresses many of the same issues as in *Bullock*, immediately above. The decision holds that the fact that an employee was terminated as a result of his medical condition is not sufficient to establish that the employer regarded him as substantially impaired in the life activity of working. It sets out the test for qualifying as disabled under the "regarded as" definition. An employee qualifies as disabled under the "regarded as" definition when: (1) An employer mistakenly believes that he has an impairment that substantially limits one or more major life activities; or (2) an employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities. Thus, an employee who is merely regarded as disabled does not need an accommodation. Decisions holding that an appellant can establish that the agency regarded him as substantially limited in working without showing that it viewed him as foreclosed from performing jobs in his geographical area open to the average person having his comparable training, skills, and abilities in his geographical area, were overruled. The proof needed to show disability based on a record of an impairment was also restated. Specifically, under 29 CFR 1630.2(k), an employee satisfies this definition of disability if he "has a history of, or has been mis-classified as having, a mental or physical impairment that substantially limits one or more major life activities." As with the "regarded as" definition, the appellant's removal for inability to do his job does not prove that claim.

EMPLOYMENT PRACTICES

Azdell & Fishman v. Meeker, et al., **87 M.S.P.R. 133 (2000), 88 M.S.P.R. 319 (2001), 89 M.S.P.R. 88 (2001)**

The first of these decisions explored the rating scheme for the administrative law judge (ALJ) examination under 5 CFR 930.203 as implemented in 1996. Because implementation of the 1996 scoring formula involved the development and use of examinations

and qualification standards, it constituted an employment practice, so that these challenges constituted appeals properly before the Board under 5 CFR Part 300A. The Board held that use of the 1996 scoring formula was not rationally related to performance in an ALJ position, so that the employment practice did not meet the basic requirements of 5 CFR 300.103(a) and (b). Nor did it accord with the Veterans Preference Act because it gave preference eligibles more of an advantage than Congress intended. A relief order commensurate with the harm caused was directed.

On April 12, 2001, the Board issued its second decision in these appeals, an order staying the relief ordered, in part, for 60 days to allow the parties and the Board to examine the evidence and make determinations as to the outstanding compliance issues. During the period, OPM was ordered to stop issuing any ALJ registers and certificates of eligibles, and to withdraw and hold in abeyance any that had been issued since the merits decision was issued. On April 27, 2001, the Board denied the motion of the Social Security Administration (SSA) to intervene because its interest in the adjudication is not substantive, but just the quick completion of the process. Its participation was considered to be as *amicus curiae*. The Board also denied the request to lift the stay on compliance, finding that the risks of potential harm to the parties outweighed SSA's assurances that it would be hiring a sufficient number of people to provide relief to any class member.

In the last of the three decisions, the Board denied OPM's reconsideration request concerning the first decision. The decision repeats and expands upon several of the holdings in that case, among them those addressing employment practices, 5 CFR 5.1(b), which authorizes the Director of OPM to allow a variation from OPM regulations, and veterans' preference. It also discusses several rules of statutory construction and addresses a new issue as to joinder.

JURISDICTION - CONSTRUCTIVE ACTIONS

Manlogon v. Environmental Protection Agency, **87 M.S.P.R. 653 (2001)**

Because the law of constructive demotions under *Russell v. Department of the Navy*, 6 M.S.P.R. 698, had become clouded, the Board used this case to clarify it. Although *Hogan v. Department of the Navy*, 81 M.S.P.R. 252, has been interpreted to hold that a constructive demotion can only be found where the higher graded position had been classified "subsequent to" the appellant's reassignment, the Board here found no reason for requiring a particular sequence of events. Thus, it overruled the "subsequent to" requirement in *Hogan*. However, it reaffirmed the rule that an argument that an appellant's position "should have been" upgraded does not suffice as a claim of constructive demotion. Finally, it held that the fact that the appellant's allegedly reclassified job was abolished without ever having been filled does not defeat the claim during the time period the job was classified at the higher level. The decision also discusses certain rules concerning position classification and when it becomes effective for purposes of this kind of case.

JURISDICTION – GENERAL

Edwards v. Department of Justice, **87 M.S.P.R. 518 (2001)**

This case discusses the Board's jurisdiction over claims that a non-selection action actually constitutes an appealable determination of unsuitability under 5 CFR Part 731. In it, the Board clarified its precedent to hold that a governmentwide bar to competitive service employment is not a jurisdictional prerequisite to a suitability appeal. That is, if an individual is found to be unsuitable for a position based on the reasons set forth under the suitability regulations issued by the Office of Personnel Management, *see* 5 CFR 731.202, the Board may conclude that the candidate was subjected to an appealable constructive suitability determination.

Campbell v. United States Postal Service, **88 M.S.P.R. 546 (2001)**

After noting that the rules for crediting time in a non-pay status for competitive service probationers do not apply to the excepted service, the Board concluded that the appellant's time in a non-duty status was creditable for purposes of her completion of one year of current continuous service in the Postal Service.

PROCEDURAL ISSUES

Vicente v. Department of the Army, **87 M.S.P.R. 80 (2000)**

Because a video-conference hearing was held over the appellant's objection, and the Board found that there are serious questions of witness credibility going to the central disputed facts in this case which the administrative judge might have resolved differently had she held that portion of the hearing in-person, it concluded that a portion of the hearing must be held in person.

Milner v. Department of Justice, **87 M.S.P.R. 660 (2001)**

This decision clarifies Board policy on dismissals without prejudice and sets it out with specificity. That policy is that: "(1) A case will not be dismissed without prejudice to refiling simply to avoid exceeding the 120-day adjudication standard; (2) the dismissal of a case without prejudice to refiling will be granted or ordered only at the request of one or both of the parties or in order to avoid a lengthy or indefinite continuance; and (3) the dismissal of a case without prejudice to refiling is a procedural option that is left to the sound discretion of the administrative judge (citation omitted) but this discretion must be exercised in a manner consistent with the policies set forth in this Opinion and Order." The Board also held that a special rule concerning such dismissals applies to USERRA appeals; see summary of *Milner* under "USERRA, VEOA and VETERANS' RIGHTS" below.

Dixon v. United States Postal Service, **89 M.S.P.R. 148 (2001)**

This case was remanded for application of the procedures required under *French v. Office of Personnel*

Management, 37 M.S.P.R. 496, and to implement 5 CFR 844.202 (which sets requirements for when an agency must file a disability retirement application on the appellant's behalf) "in a manner that draws the Board, the employing agency, and OPM together in a cooperative undertaking to assure that persons of likely mental incapacity will not suffer impairment of their right to disability retirement benefits on account of their incapacity." In its decision, the Board set out instructions to the administrative judge as to his role in the process. Specifically, he should monitor the progress of the application, including setting reasonable time limits where appropriate, to ensure that the agency complies with its duty to prosecute the application in good faith and to ensure that OPM complies with its duty to process the application expediently and in good faith. He may join OPM as a party to the appeal, or initiate the procedures to request *pro bono* representation for the appellant, if he determines that such steps are appropriate or necessary. Additionally, he has the authority to vacate the initial decision to the extent necessary to facilitate any settlement agreement that the parties and OPM may reach. When OPM issues a decision, he is to ensure that the appellant and her representative, if she is represented at that time, understand her options, including requesting reconsideration and appealing to the Board.

REEMPLOYMENT PRIORITY

Sturdy v. Department of the Army, **88 M.S.P.R. 502 (2001)**

This decision discusses the Board's jurisdiction over reemployment priority issues. Its main holding is that separation by a reduction in force is not a jurisdictional requirement for a reemployment priority rights appeal. The Board modified or overruled decisions that may be inconsistent. The decision also notes that the RPL regulations are based on section 15 of the Veterans' Preference Act of 1944, presently codified at 5 U.S.C. § 3315, and on 5 U.S.C. § 8151(b)(2). After finding that the appellant had standing to appeal a denial of his RPL rights, and that the three vacancies at issue were subject to both the RPL and the agency Priority Placement Program (PPP), the Board found that the appellant was entitled to an opportunity to show, on remand, that the agency violated his rights under either or both programs.

RETIREMENT ISSUES

Wallace v. Office of Personnel Management, **88 M.S.P.R. 375 (2001)**

This is the Board's first examination of the Federal Erroneous Retirement Coverage Corrections Act (FERCCA), Pub. L. No. 106-265, which was signed into law on September 19, 2000. Generally, it provides for the correction of retirement coverage errors for employees who were in the wrong system for a minimum of three years after December 31, 1986. The Board found that it applies to this appellant's case and directed OPM to provide him

written notice of the error and an opportunity to elect CSRS-Offset coverage or FERS coverage, effective as of the date of that error. The appellant must then make his election within six months of receipt of that notice.

Treziok v. Office of Personnel Management, **89 M.S.P.R. 361 (2001)**

In a disability retirement appeal, where the position description and medical evidence unambiguously and without contradiction indicate that the appellant cannot perform the duties or meet the requirements of the position, the Board may link the medical evidence to the duties and requirements and find that he is entitled to disability retirement. The appellant's failure to submit objective medical evidence cannot be the sole reason for denying him disability retirement. Thus, where there is no cure or specific treatment for Chronic Fatigue Syndrome (CFS), and the appellant's depression is related to the CFS, the Board found that his failure to seek psychiatric help does not preclude him from receiving disability retirement. The Board therefore found the appellant was entitled to disability retirement even absent a doctor's specific link between the appellant's medical/mental conditions and the specific duties of his job.

Redmond v. Office of Personnel Management, **90 M.S.P.R. 4 (2001)**

This case examines the impact of an award of Social Security Administration benefits on a FERS disability retirement applicant. It first notes that where SSA arranged an examination of the appellant, the results are not disclosed except under the Freedom of Information Act, so that when the SSA award was submitted for the first time on petition for review, it constituted new evidence. On the merits, the decision reiterates that while the award of SSA benefits does not require the award of a FERS disability annuity, that award must be considered. Further, under SSA regulations, 20 CFR 404.1527(f)(2)(i), an SSA medical consultant is defined as a "highly qualified physician." Here, the Board concluded that the appellant, who had received a disability award from SSA based on the examinations of a doctor and a vocational expert, was also entitled to a FERS disability retirement. In so holding, the Board pointed to the recency and depth of the experts' opinions, along with the evidence before OPM and the testimony at the hearing.

USERRA, VEOA and VETERANS' RIGHTS

Milner v. Department of Justice, **87 M.S.P.R. 660 (2001)**

An appellant's right to a hearing in a Board appeal qualifies as a "benefit of employment" under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Such a benefit may not be denied to a person because of military service, so a refusal to reschedule a hearing if the appellant exercised a protected right under USERRA would violate the spirit if not the letter of USERRA. This case also holds that "to effectuate the USERRA statutory scheme … a USERRA case that has been dismissed without prejudice to refiling will be considered automatically refiled by the date set forth in the dismissal order,

unless there is evidence that the appellant has abandoned the case."

Fox v. United States Postal Service, **88 M.S.P.R. 381 (2001)**

The burden of proof in USERRA cases, as clarified in *Sheehan v. Navy*, 240 F.3d 1009, was discussed. Rather than a Title VII burden being appropriate, "in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status." Based on this holding, the Board overruled its own decisions to the extent they conflict on the burden of proof issue.

Eberhart v. United States Postal Service, **88 M.S.P.R. 398 (2001)**

The Postal Service is a "Federal executive agency" whose actions are covered by USERRA, and Board jurisdiction under USERRA includes the denial of a request for reassignment to a position in a different location, whether the employee can show that he has a right to such a reassignment or not.

Augustine v. Department of Veterans Affairs & Office of Personnel Management, **88 M.S.P.R. 407 (2001)**

Although this decision does not resolve the issues of the appeal, it both sets out the showing required to prove jurisdiction under the Veterans Employment Opportunities Act (VEOA) and discusses how veterans' preference operates in filling competitive service jobs, most specifically 5 U.S.C. §§ 3112 and 3304. The decision then requests briefs on several issues necessary to a final decision in the appeal.

Rogers v. Department of the Army, **88 M.S.P.R. 610 (2001)**

This case examined an agency's USERRA obligation under 5 CFR 353.209(a), which provides that an employee may not be demoted or separated while on duty with the uniformed services except for cause. Thus, if the appellant's position is abolished during his absence, the agency must reassign him to another position of like status and pay, and because a detail is temporary, it does not fulfill the agency's USERRA obligation. The agency must reassign him regardless of the absence of any recruitment efforts. Further, in this case, as a result of the agency's failure to reassign the appellant, he was subject to a second RIF action, in lieu of which he retired. Under these circumstances, the Board found that he had been coerced into retirement by the agency's violation of his USERRA rights.

Metzenbaum v. Department of Justice, **89 M.S.P.R. 285 (2001)**

The United States Court of Appeals for the Federal Circuit remanded this case to the Board for consideration of whether, pursuant to Board regulations, appellants in USERRA-based appeals may bring "mixed cases" before the Board, that is, affirmative defenses alleging discrimination on the basis of disability or any of the other types of discrimination covered by 5 U.S.C. § 7702(a)(1). *See* 240 F.3d 1068 (2001). The Board examined the language and

stated statutory purpose of USERRA in deciding the issue and reaffirmed its earlier determination, first set forth in *Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, that it lacks authority to reach such additional claims. Nor does Board authority allow for a decision on the merits of the underlying matter except to the extent necessary to address the appellant's military status discrimination allegations, it held.

Ruffin v. Department of the Treasury, **89 M.S.P.R. 396 (2001)**

Under the VEOA, 5 U.S.C. § 3330a(a)(1), (d), a preference eligible who alleges that an agency violated his rights under any statute or regulation relating to veterans' preference, and who has exhausted his rights under that section before the Secretary of Labor, may file an appeal with the Board. This case decides the question of the extent of the Board's authority in such an appeal. The Board held that it lacks authority in a VEOA appeal to consider the merits of the personnel action at issue and any claims of discrimination covered under 5 U.S.C. § 7702(a)(1). Rather, its authority is limited to the claim of violation of the appellant's veterans' preference rights.

WHISTLEBLOWER PROTECTION ACT

Luecht v. Department of the Navy, **87 M.S.P.R. 297 (2001)**

This decision points out that the difference between 5 U.S.C. § 2302 (b)(8) and 5 U.S.C. § 2302 (b)(9) is between reprisal based on disclosure of information and reprisal based on the exercise of a right to file an appeal, complaint, or grievance. The filing of an EEO complaint alleging discriminatory treatment in violation of Title VII does not constitute a whistleblowing disclosure under section 2302(b)(8), but instead, falls under section 2302(b)(9)(A). The decision, however, finds that coverage under section 2302(b)(9) does not necessarily exclude it from section 2302(b)(8), if the appellant also made a disclosure based on the same operative facts but outside of his (b)(9) activity.

Kinan v. Department of Defense, **87 M.S.P.R. 561 (2001)**

Among other Whistleblower Protection Act (WPA)-related issues, this decision discusses the "reasonable belief" requirement. It holds that in determining whether the appellant had a reasonable belief in the truth of the matters he disclosed, the fact that the agency had conducted two investigations into the matters he raised, and issues arising from them, "lends a degree of legitimacy" to his claims. Under *Lachance v. White*, 174 F.3d 1378, the Board is to consider the appellant's self-interest and potential bias, and the rule is that the fact that others may have shared the appellant's belief is not sufficient to find a reasonable belief. Nonetheless, the fact that his view was shared by others is not thereby made irrelevant; nor must every appellant's bias be viewed as dispositive. Where the appellant did not file EEO complaints on his own behalf, but complained to management about what he viewed as the agency's failures to remedy under-representation in the EEO Office and to enforce the sexual harassment policy, his allegations come within 5 U.S.C. § 2302(b)(8), as a

whistleblowing disclosure, not (b)(9), as one of retaliation for the exercise of an appeal, complaint, or grievance right.

Pastor v. Department of Veterans Affairs, **87 M.S.P.R. 609 (2001)**

The Board's authority to award consequential damages under the WPA includes the authority to award compensation for future medical expenses which are the result of the retaliation and which can be proven with reasonable certainty.

Arauz v. Department of Justice, **89 M.S.P.R. 529 (2001)**

When the Government's interests and good name are implicated in the alleged wrongdoing at issue by a private organization, and when the appellant shows that she reasonably believed that the information she disclosed evidenced that wrongdoing, the disclosure is protected under 5 U.S.C. § 2302(b)(8). Cases holding or implying to the contrary were overruled, e.g., *Coons v. Department of the Treasury*, 85 M.S.P.R. 631 (2000) . The decision also notes that evidence that would support a finding that the appellant would have been granted one kind of leave in the absence of her protected disclosures would not necessarily be sufficient to support a finding that she would have been granted another kind of leave in the absence of those disclosures. Denial of administrative leave is not the denial of a benefit under the WPA unless the agency has a policy of granting such leave in the same circumstances.

Significant Court Decisions

UNITED STATES SUPREME COURT

United States Postal Service v. Gregory, **122 S.Ct. 431 (2001)**

The Supreme Court held that the Board may independently review prior disciplinary actions, including those that are still the subject of pending grievance procedures, when determining the reasonableness of a penalty imposed by the employing agency. In so holding, the Court vacated the Federal Circuit's decision in *Gregory v. U.S. Postal Service*, 212 F.3d 1296 (Fed. Cir. 2000), and remanded for further proceedings.

The Court held that independent review does not violate the statutory scheme of the Civil Service Reform Act of 1978. Where a termination is based on a series of disciplinary actions, some of which are minor, the Board's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the penalty's reasonableness. The Court stated that if the Board's independent review procedure is adequate, then the review that an employee receives is fair.

(The Supreme Court's decision was issued on November 13, 2001—early in FY 2002. It is included in the FY 2001 Annual Report because of its impact on the Federal Circuit's ruling in *Gregory* and on Board decisions applying the Federal Circuit's *Gregory* rule.)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DISABILITY

Bracey v. Office of Personnel Management, **236 F.3d 1356 (Fed. Cir. 2001)**

Regulations of the Office of Personnel Management (OPM) provide two ways for an agency to retain a disabled Federal employee: (1) assign the employee to an established vacant position at the same grade and pay; (2) accommodate the employee's disability in a way that enables the employee to perform the duties of his official position. However, a Federal employee is not disqualified for disability benefits under OPM regulations by virtue of his being given light-duty assignments in the same position.

DUE PROCESS

Blank v. Department of the Army, **247 F.3d 1225 (Fed. Cir. 2001)**

An employee's due process guarantee of notice and an opportunity to respond was not violated where a deciding official obtained information regarding pending charges through investigatory communications that did no more than confirm or clarify the record. The rule in G*regory* v. *U.S. Postal Service*, 212 F.3d 1296 (Fed. Cir. 2000), *vacated and remanded, U.S. Postal Service v. Gregory*, No. 00-758 (U.S. Nov. 13, 2001) that an employing agency and the

Board may not consider prior disciplinary actions taken against an employee that are the subject of ongoing proceedings challenging their merits does not apply to prior disciplinary actions pending before the Equal Employment Opportunity Commission on complaints of discrimination.

Modrowski v. Department of Veterans Affairs, **252 F.3d 1344 (Fed. Cir. 2001)**

It was arbitrary and capricious to charge an employee with "refusal to cooperate" where the agency, among other things, unfairly denied the employee the opportunity to consult with his attorney.

JURISDICTION

Kelley v. Merit Systems Protection Board, **241 F.3d 1368 (Fed. Cir. 2001)**

A reduction in pay is typically an adverse action over which the Board has jurisdiction. Therefore, the Board has jurisdiction where an agency transferred an employee from a full-time position to a part-time position unless it is clear that the employee suffered no reduction in pay.

Monasteri v. Merit Systems Protection Board, **232 F.3d 1376 (Fed. Cir. 2000)**

The Board does not have jurisdiction over an appeal by a Foreign Service National employee where the employing agency terminated the employee pursuant to its "special plans for reduction in force in its foreign national employee programs" under 5 CFR 351.201(d).

RETIREMENT – LEO CREDIT

Pitsker v. Office of Personnel Management, **234 F.3d 1378 (Fed. Cir. 2000)**

Federal law enforcement officers (LEOs) who retire on disability before they reach 50 years of age are nevertheless entitled to receive enhanced annuities under 5 U.S.C. § 8339(d)(1). The court declined to adopt OPM's interpretation of the statute because it was unpersuasive and would cause absurd results.

Watson v. Department of the Navy, **262 F.3d 1292 (Fed. Cir. 2001)**

Under a legally correct construction of the statutes and regulations, a Federal police officer seeking LEO early retirement credit must prove that he or she occupied a position that primarily required the investigation, apprehension, or detention of criminals or suspects, rather than merely the protection of life or property, and that the duties of the position were so physically demanding as to necessitate his or her retirement at an unusually early age.

SETTLEMENT AGREEMENTS

Fomby-Denson v. Department of the Army, **247 F.3d 1366 (Fed. Cir. 2001)**

It would be contrary to public policy to construe a settlement agreement to bar an agency from making a criminal referral to law enforcement authorities.

USERRA, VEOA, and VETERANS' RIGHTS

Brown v. Department of Veterans Affairs, **247 F.3d 1222 (Fed. Cir. 2001)**

Veterans are not accorded any preference under the Veterans' Preference Act when seeking promotions or intra-agency transfers.

Fernandez v. Department of the Army, **234 F.3d 553 (Fed. Cir. 2000)**

The Veterans Programs Enhancement Act of 1998 did not make the substantive provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA) retroactive. The Board's authority is limited to enforcing an employee's rights as they existed at the time the claim accrued.

Sheehan v. Department of the Navy, **240 F.3d 1009 (Fed. Cir. 2001)**

An employee making a discrimination claim under USERRA bears the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in an adverse employment action. Motivation or intent may be proven by either direct or circumstantial evidence. If the employee meets this burden, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason.

WHISTLEBLOWER PROTECTION ACT

Bohac v. Department of Agriculture, **239 F.3d 1334 (Fed. Cir. 2001)**

Non-pecuniary damages are not recoverable under the Whistleblower Protection Act (WPA).

Huffman v. Office of Personnel Management, **263 F.3d 1341 (Fed. Cir. 2001)**

Complaints to a supervisor about the supervisor's wrongful conduct do not constitute "disclosures" under the WPA. However, complaints to a supervisor about other employees' conduct or other misconduct may be disclosures covered by the WPA. Reports made as part of an employee's assigned normal job responsibilities are not covered by the WPA when made through normal channels.

Langer v. Department of the Treasury, **No. 00-3388 (Fed. Cir. Sept. 18, 2001)**

In an individual right of action (IRA) appeal, the standard for establishing subject matter jurisdiction and the right to a hearing is assertion of a non-frivolous claim, while the standard for establishing a prima facie case in an IRA appeal is preponderant evidence.

Meuwissen v. Department of the Interior, **234 F.3d 9 (Fed. Cir. 2000)**

A disclosure of information that is publicly known is not a "disclosure" under the WPA. The purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known and who step forward to help uncover and disclose that information.

Singleton v. Merit Systems Protection Board, **244 F.3d 1331 (Fed. Cir. 2001)**

The Board's orders in IRA appeals are not enforceable against State national guards or other State officials.

Yunus v. Department of Veterans Affairs, **242 F.3d 1367 (Fed. Cir. 2001)**

The court recognized that the Board and the court have taken different approaches to jurisdictional issues in IRA appeals. The court noted its precedent holding that the Board has jurisdiction in an IRA appeal if the appellant has exhausted his administrative remedies before the Special Counsel and makes non-frivolous allegations that: (1) he made a protected disclosure under 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in a covered personnel action as defined by 5 U.S.C. § 2302(a). When the Board's jurisdiction is clear, the court will not remand pursuant to *Schmittling v. Department of the Army*, 219 F.3d 1332 (Fed. Cir. 2000), if the Board bypasses the question of its jurisdiction in order to decide the case on a non-jurisdictional ground.

The U.S. Court of Appeals for the Federal Circuit maintains a Web site at *www.fedcir.gov*, which provides quick access to two other Web sites that make the court's decisions available.

FY 2001 Case Processing Statistical Data

SUMMARY TABLE OF MSPB DECISIONS IN FY 2001

Regional Office (RO)/Field Office (FO) Decisions:	
Appeals	6,259
Addendum Cases [1]	814
Stay Requests [2]	101
TOTAL RO/FO Decisions	**7,174**
ALJ Decisions - Original Jurisdiction Cases [3]	**12**
Board Decisions:	
Appellate Jurisdiction:	
PFRs - Appeals	1,131
PFRs - Addendum Cases	130
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	6
Reopenings [4]	11
Court Remands	15
Compliance Referrals	56
EEOC Non-concurrence Cases	2
Arbitration Cases [5]	6
Subtotal	1,357
Original Jurisdiction [6]	16
TOTAL Board Decisions [7]	**1,373**
TOTAL Decisions (Board, ALJ, RO/FOs)	**8,559**

See next page for footnotes.

FOOTNOTES TO SUMMARY TABLE

[1] Includes 200 requests for attorney fees, 10 requests for compensatory damages (discrimination cases only), 8 requests for consequential damages (whistleblower cases only), 456 petitions for enforcement, 130 Board remand cases, and 10 court remand cases. (Four of the petitions for enforcement were adjudicated at Board headquarters.)

[2] Includes 67 stay requests in whistleblower cases and 34 in non-whistleblower cases.

[3] Initial Decisions issued by ALJ. Case type breakdown: 1 petition for enforcement in an OSC corrective action, 1 request for attorney fees in an OSC disciplinary action (non-Hatch Act), 7 Hatch Act cases, 2 actions against ALJs, and 1 petition for enforcement in an ALJ case.

[4] Includes 6 cases reopened by the Board on its own motion and 5 cases where OPM requested reconsideration.

[5] Includes 5 requests to review an arbitrator's award and 1 petition for enforcement in an arbitration case.

[6] Final Board decisions. Case type breakdown: 1 enforcement case in an OSC corrective action, 2 reopenings in OSC disciplinary actions (non-Hatch Act), 1 PFR in a Hatch Act case, 2 PFRs in actions against ALJs, and 10 requests for regulation review.

[7] In addition to the 1,373 cases closed by the Board with a final decision, there were 2 interlocutory appeals decided by the Board in FY 2001. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

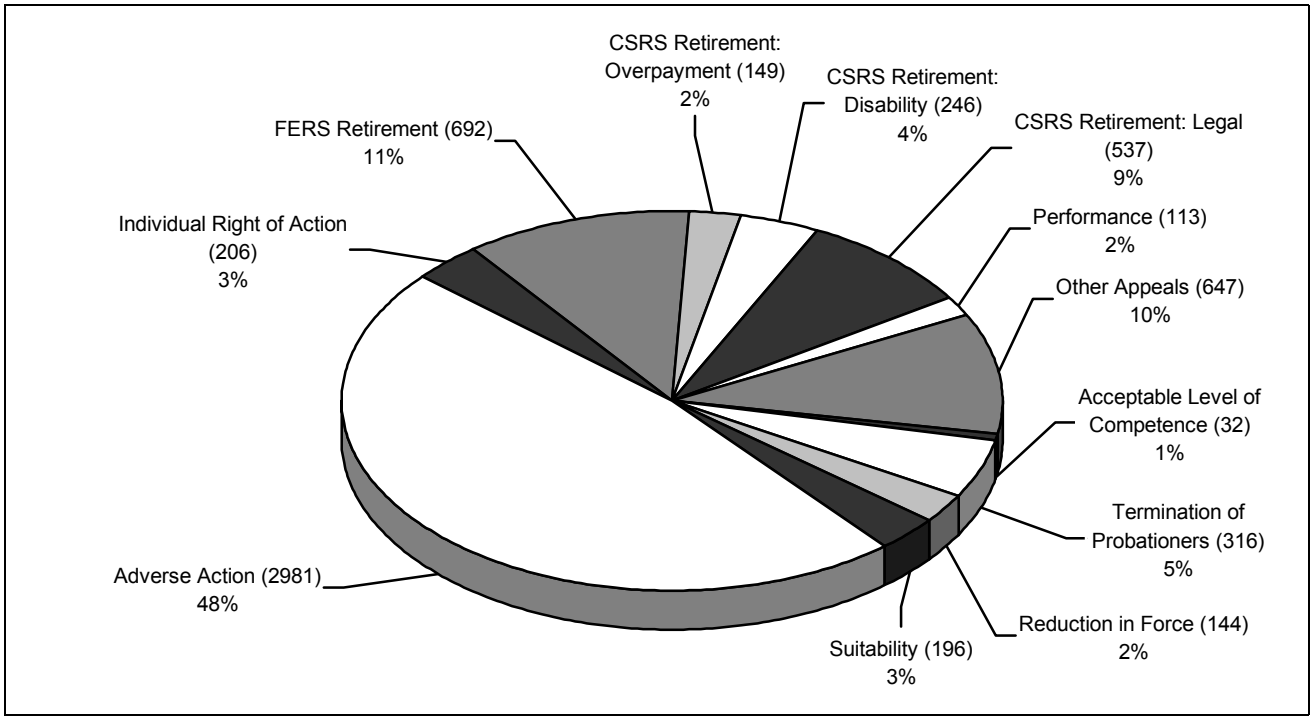
Regional Decisions

DISPOSITION OF INITIAL APPEALS DECIDED IN FY 2001 BY TYPE OF CASE

Type of Case	Decided	Dismissed		Not Dismissed		Settled		Adjudicated	
Adverse Action by Agency	2981	1326	44%	1655	56%	1187	72%	468	28%
Termination of Probationers	316	291	92%	25	8%	16	64%	9	36%
Reduction in Force	144	73	51%	71	49%	36	51%	35	49%
Performance	113	30	27%	83	73%	64	77%	19	23%
Acceptable Level of Competence (WIGI)	32	15	47%	17	53%	13	76%	4	24%
Suitability	196	36	18%	160	82%	129	81%	31	19%
CSRS Retirement: Legal	537	211	39%	326	61%	19	6%	307	94%
CSRS Retirement: Disability	246	118	48%	128	52%	17	13%	111	87%
CSRS Retirement: Overpayment	149	55	37%	94	63%	61	65%	33	35%
FERS Retirement	692	255	37%	437	63%	178	41%	259	59%
Individual Right of Action	206	135	66%	71	34%	37	52%	34	48%
Other	647	554	86%	93	14%	50	54%	43	46%
Total	**6259**	**3099**	**50%**	**3160**	**50%**	**1807**	**57%**	**1353**	**43%**

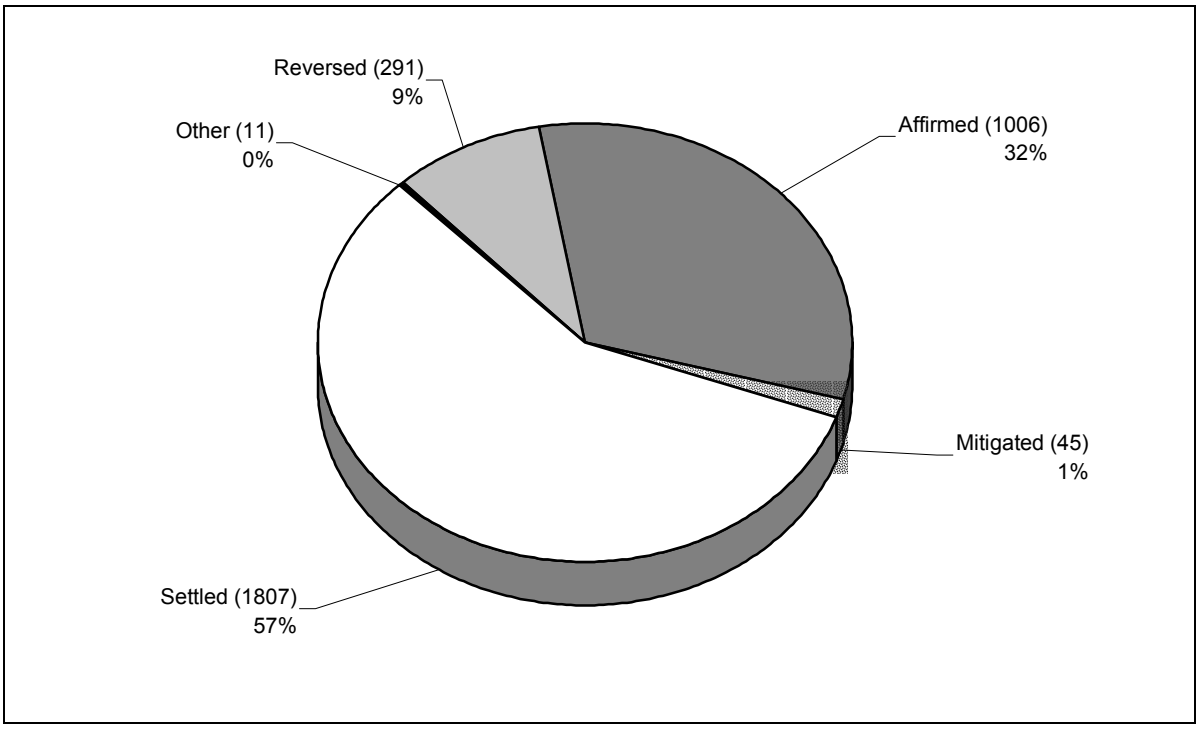
Dismissed and **Not Dismissed** columns are percentages of **Decided** column
Settled and **Adjudicated** columns are percentages of **Not Dismissed** column

TYPES OF INITIAL APPEALS DECIDED IN FY 2001



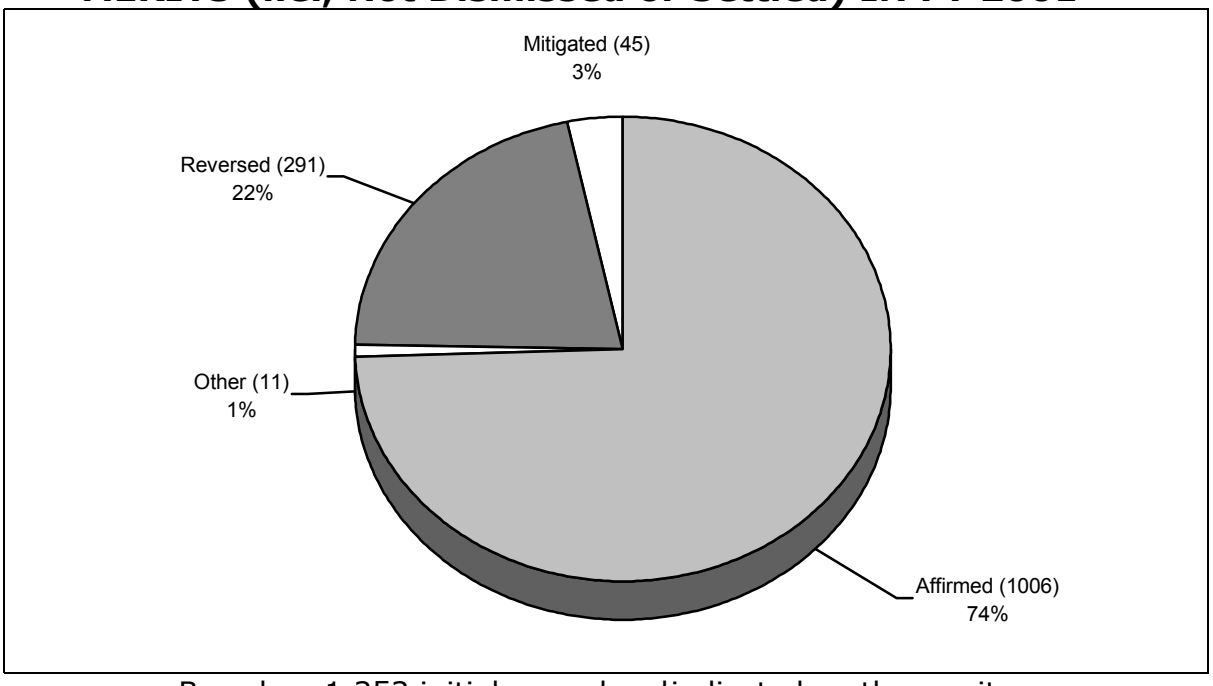
Total Number of Initial Appeals: 6,259

DISPOSITION OF INITIAL APPEALS IN FY 2001 THAT WERE NOT DISMISSED



Total Number of Initial Appeals that were Not Dismissed: 3,160
(Percentages do not total 100% because of rounding)

DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS (i.e., Not Dismissed or Settled) IN FY 2001



Based on 1,353 initial appeals adjudicated on the merits

INITIAL APPEALS DECIDED IN FY 2001 BY AGENCY

	Decided	Dismissed[1]		Not Dismissed		Settled[2]		Adjudicated	
OPM *	1551	570	36.8%	981	63.2%	293	29.9%	688	70.1%
Postal Service	1373	700	51.0%	673	49.0%	498	74.0%	175	26.0%
Veterans Affairs	485	288	59.4%	197	40.6%	141	71.6%	56	28.4%
Justice	421	209	49.6%	212	50.4%	157	74.1%	55	25.9%
Navy	366	191	52.2%	175	47.8%	115	65.7%	60	34.3%
Army	360	189	52.5%	171	47.5%	109	63.7%	62	36.3%
Treasury	255	142	55.7%	113	44.3%	68	60.2%	45	39.8%
Defense	218	115	52.8%	103	47.2%	76	73.8%	27	26.2%
Air Force	211	113	53.6%	98	46.4%	64	65.3%	34	34.7%
Transportation	191	122	63.9%	69	36.1%	48	69.6%	21	30.4%
Agriculture	170	88	51.8%	82	48.2%	44	53.7%	38	46.3%
Interior	161	81	50.3%	80	49.7%	52	65.0%	28	35.0%
Social Security	72	43	59.7%	29	40.3%	18	62.1%	11	37.9%
Health, Human Servs.	66	30	45.5%	36	54.5%	26	72.2%	10	27.8%
GSA	47	36	76.6%	11	23.4%	7	63.6%	4	36.4%
Commerce	39	31	79.5%	8	20.5%	6	75.0%	2	25.0%
Labor	39	24	61.5%	15	38.5%	11	73.3%	4	26.7%
Smithsonian	23	11	47.8%	12	52.2%	10	83.3%	2	16.7%
Energy	22	10	45.5%	12	54.5%	9	75.0%	3	25.0%
HUD	22	12	54.5%	10	45.5%	7	70.0%	3	30.0%
State	15	8	53.3%	7	46.7%	5	71.4%	2	28.6%
EPA	14	3	21.4%	11	78.6%	6	54.5%	5	45.5%
TVA	10	7	70.0%	3	30.0%	1	33.3%	2	66.7%
District of Columbia	9	4	44.4%	5	55.6%	2	40.0%	3	60.0%
Other	9	8	88.9%	1	11.1%	1	100.0%	0	.0%
SBA	9	6	66.7%	3	33.3%	2	66.7%	1	33.3%
GPO	8	6	75.0%	2	25.0%	2	100.0%	0	.0%
Education	7	6	85.7%	1	14.3%	1	100.0%	0	.0%
NASA	7	2	28.6%	5	71.4%	3	60.0%	2	40.0%
National Credit Union Adm.	7	4	57.1%	3	42.9%	0	.0%	3	100.0%
FEMA	6	5	83.3%	1	16.7%	1	100.0%	0	.0%
NARA	6	4	66.7%	2	33.3%	2	100.0%	0	.0%
FDIC	5	2	40.0%	3	60.0%	3	100.0%	0	.0%
Selective Service System	5	4	80.0%	1	20.0%	1	100.0%	0	.0%
Adm. Office of the US Courts	3	3	100.0%	0	.0%	0	.0%	0	.0%
EEOC	3	2	66.7%	1	33.3%	0	.0%	1	100.0%
NLRB	3	1	33.3%	2	66.7%	2	100.0%	0	.0%
Nat. Security Agency	3	2	66.7%	1	33.3%	1	100.0%	0	.0%
Peace Corps	3	2	66.7%	1	33.3%	1	100.0%	0	.0%
Railroad Retirement Board	3	1	33.3%	2	66.7%	1	50.0%	1	50.0%

Percentages may not add to 100 due to rounding.

*Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

[1] Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."
[2] Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

INITIAL APPEALS DECIDED IN FY 2001 BY AGENCY (continued)

	Decided	Dismissed[1]		Not Dismissed		Settled[2]		Adjudicated	
Soldiers' & Airmen's Home	3	1	33.3%	2	66.7%	1	50.0%	1	50.0%
Advisory Council onHistoric Preservation	2	1	50.0%	1	50.0%	1	100.0%	0	.0%
Commodity Futures Trading Commission	2	1	50.0%	1	50.0%	1	100.0%	0	.0%
Federal Election Comm.	2	2	100.0%	0	.0%	0	.0%	0	.0%
Federal Retirement Thrift Investment Board	2	0	.0%	2	100.0%	2	100.0%	0	.0%
Presidio Trust	2	2	100.0%	0	.0%	0	.0%	0	.0%
US International Dev. Agency	2	2	100.0%	0	.0%	0	.0%	0	.0%
Amer. Battle Monuments Comm	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Board for Internt'al Broadcasting	1	1	100.0%	0	.0%	0	.0%	0	.0%
Broadcasting Bd. Of Governors	1	0	.0%	1	100.0%	0	.0%	1	100.0%
Chemical Safety Hazard Investigation Board	1	1	100.0%	0	.0%	0	.0%	0	.0%
Consumer Product Safety Comm	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Farm Credit Administration	1	1	100.0%	0	.0%	0	.0%	0	.0%
FCC	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Federal Home Loan Bank Bd.	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Federal Housing Finance Bd.	1	0	.0%	1	100.0%	0	.0%	1	100.0%
Federal Trade Commission	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Holocaust Memorial Council	1	0	.0%	1	100.0%	0	.0%	1	100.0%
Inter-American Foundation	1	0	.0%	1	100.0%	1	100.0%	0	.0%
National Capital Planning Comm.	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Nat'al Transportation Safety Bd.	1	1	100.0%	0	.0%	0	.0%	0	.0%
Office of the US Trade Rept.	1	0	0.0%	1	100.0%	0	.0%	1	100.0%
Pension Benefit Guaranty Corp.	1	1	100.0%	0	.0%	0	.0%	0	.0%
Purchase from Blind and Severe Handicapd	1	0	.0%	1	100.0%	1	100.0%	0	.0%
TOTAL	6259	3099	49.5%	3160	50.5%	1807	57.2%	1353	42.8%

Percentages may not add to 100 due to rounding.

[1] Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."
[2] Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

INITIAL APPEALS ADJUDICATED* IN FY 2001 BY AGENCY

	Adjudicated	Affirmed		Reversed		Mitigated/Modified		Other	
OPM	688	479	69.6%	193	28.1%	5	.7%	11	1.6%
Postal Service	175	122	69.7%	36	20.6%	17	9.7%	0	.0%
Veterans Affairs	56	46	82.1%	8	14.3%	2	3.6%	0	.0%
Justice	55	42	76.4%	12	21.8%	1	1.8%	0	.0%
Navy	60	52	86.7%	8	13.3%	0	.0%	0	.0%
Army	62	54	87.1%	7	11.3%	1	1.6%	0	.0%
Treasury	45	37	82.2%	7	15.6%	1	2.2%	0	.0%
Defense	27	24	88.9%	2	7.4%	1	3.7%	0	.0%
Air Force	34	30	88.2%	3	8.8%	1	2.9%	0	.0%
Transportation	21	16	76.2%	2	9.5%	3	14.3%	0	.0%
Agriculture	38	22	57.9%	5	13.2%	11	28.9%	0	.0%
Interior	28	26	92.9%	1	3.6%	1	3.6%	0	.0%
Social Security	11	10	90.9%	1	9.1%	0	.0%	0	.0%
Health, Human Servs.	10	8	80.0%	2	20.0%	0	.0%	0	.0%
GSA	4	4	100.0%	0	.0%	0	.0%	0	.0%
Commerce	2	2	100.0%	0	.0%	0	.0%	0	.0%
Labor	4	4	100.0%	0	.0%	0	.0%	0	.0%
Smithsonian	2	1	50.0%	0	.0%	1	50.0%	0	.0%
Energy	3	3	100.0%	0	.0%	0	.0%	0	.0%
HUD	3	2	66.7%	1	33.3%	0	.0%	0	.0%
State	2	2	100.0%	0	.0%	0	.0%	0	.0%
EPA	5	4	80.0%	1	20.0%	0	.0%	0	.0%
TVA	2	2	100.0%	0	.0%	0	.0%	0	.0%
District of Columbia	3	3	100.0%	0	.0%	0	.0%	0	.0%
Other	0	0	.0%	0	.0%	0	.0%	0	.0%
SBA	1	1	100.0%	0	.0%	0	.0%	0	.0%
GPO	0	0	.0%	0	.0%	0	.0%	0	.0%
Education	0	0	.0%	0	.0%	0	.0%	0	.0%
NASA	2	1	50.0%	1	50.0%	0	.0%	0	.0%
National Credit Union Adm.	3	2	66.7%	1	33.3%	0	.0%	0	.0%
FEMA	0	0	.0%	0	.0%	0	.0%	0	.0%
NARA	0	0	.0%	0	.0%	0	.0%	0	.0%
Selective Service System	0	0	.0%	0	.0%	0	.0%	0	.0%
Adm. Office of the US Courts	0	0	.0%	0	.0%	0	.0%	0	.0%
EEOC	1	1	100.0%	0	.0%	0	.0%	0	.0%
NLRB	0	0	.0%	0	.0%	0	.0%	0	.0%
National Security Agency	0	0	.0%	0	.0%	0	.0%	0	.0%

Percentages may not add to 100 due to rounding.

* ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled.

INITIAL APPEALS ADJUDICATED* IN FY 2001 BY AGENCY (continued)

	Adjudicated	Affirmed		Reversed		Mitigated/Modified		Other	
Peace Corps	0	0	.0%	0	.0%	0	.0%	0	.0%
Railroad Retirement Board	1	1	100.0%	0	.0%	0	.0%	0	.0%
Soldiers' & Airmen's Home	1	1	100.0%	0	.0%	0	.0%	0	.0%
Advisory Council on Historic Preservation	0	0	.0%	0	.0%	0	.0%	0	.0%
Commodity Futures Trading Comm.	0	0	.0%	0	.0%	0	.0%	0	.0%
Federal Election Comm.	0	0	.0%	0	.0%	0	.0%	0	.0%
Federal Retirement Thrift Investment Board	0	0	.0%	0	0%	0	.0%	0	.0%
Presidio Trust	0	0	.0%	0	.0%	0	.0%	0	.0%
US International Develmt Agn.	0	0	.0%	0	.0%	0	.0%	0	.0%
American Battle Monuments Commission	0	0	.0%	0	.0%	0	.0%	0	.0%
Bd. For Internt'al Broadcasting	0	0	.0%	0	.0%	0	.0%	0	.0%
Broadcasting Bd. Of Governors	1	1	100.0%	0	.0%	0	.0%	0	.0%
Chemical Safety Hazard Investigation Board	0	0	.0%	0	.0%	0	.0%	0	.0%
Consumer Product Safety Com	0	0	.0%	0	.0%	0	.0%	0	.0%
Farm Credit Adm.	0	0	.0%	0	.0%	0	.0%	0	.0%
FCC	0	0	.0%	0	.0%	0	.0%	0	.0%
Fed. Home Loan Bank Bd.	0	0	.0%	0	.0%	0	.0%	0	.0%
Fed. Housing Finance Bd.	1	1	100.0%	0	.0%	0	.0%	0	.0%
FTC	0	0	.0%	0	.0%	0	.0%	0	.0%
Holocaust Memorial Council	1	1	100.0%	0	.0%	0	.0%	0	.0%
Inter-American Foundation	0	0	.0%	0	.0%	0	.0%	0	.0%
Nat'al Capital Planning Comm.	0	0	.0%	0	.0%	0	.0%	0	.0%
Nat'al Transportation Safety Bd	0	0	.0%	0	.0%	0	.0%	0	.0%
Office of the US Trade Rept.	1	1	100.0%	0	.0%	0	.0%	0	.0%
Pension Benefit Guaranty Corp	0	0	.0%	0	.0%	0	.0%	0	.0%
Purchase from Blind and Severe Handicapped	0	0	.0%	0	.0%	0	.0%	0	.0%
TOTAL	1353	1006	74.4%	291	21.5%	45	3.3%	11	.8%

Percentages may not add to 100 due to rounding.

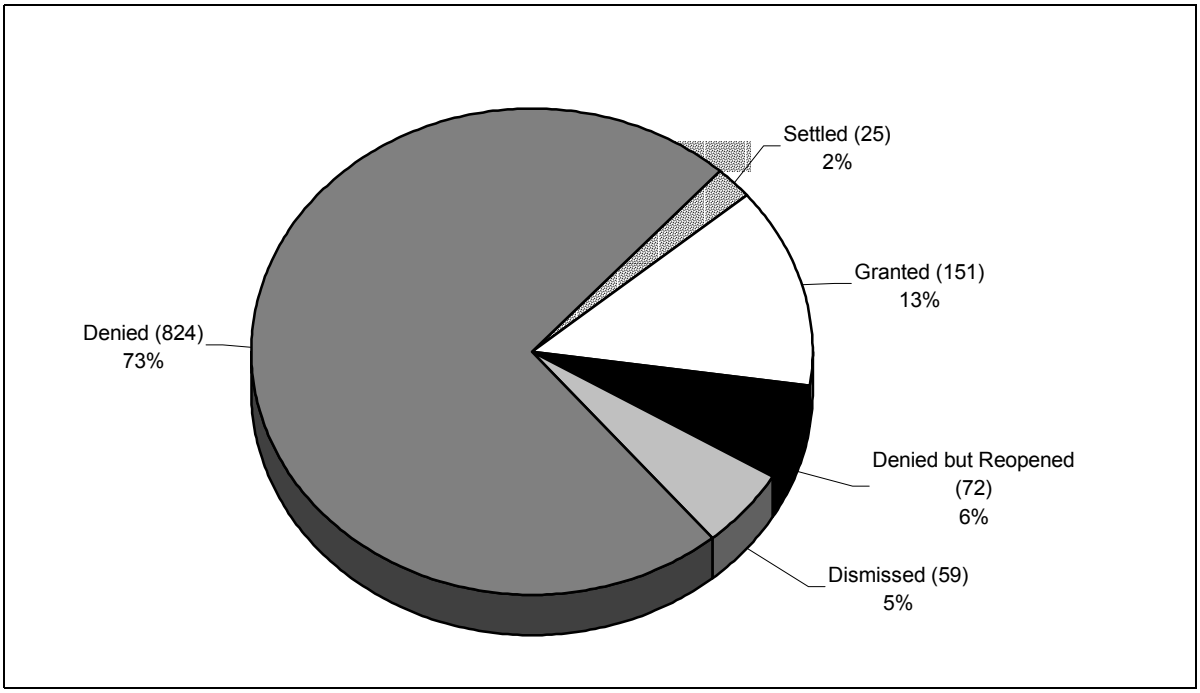
* ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled.

Headquarters Decisions

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DECIDED IN FY 2001 BY TYPE OF CASE

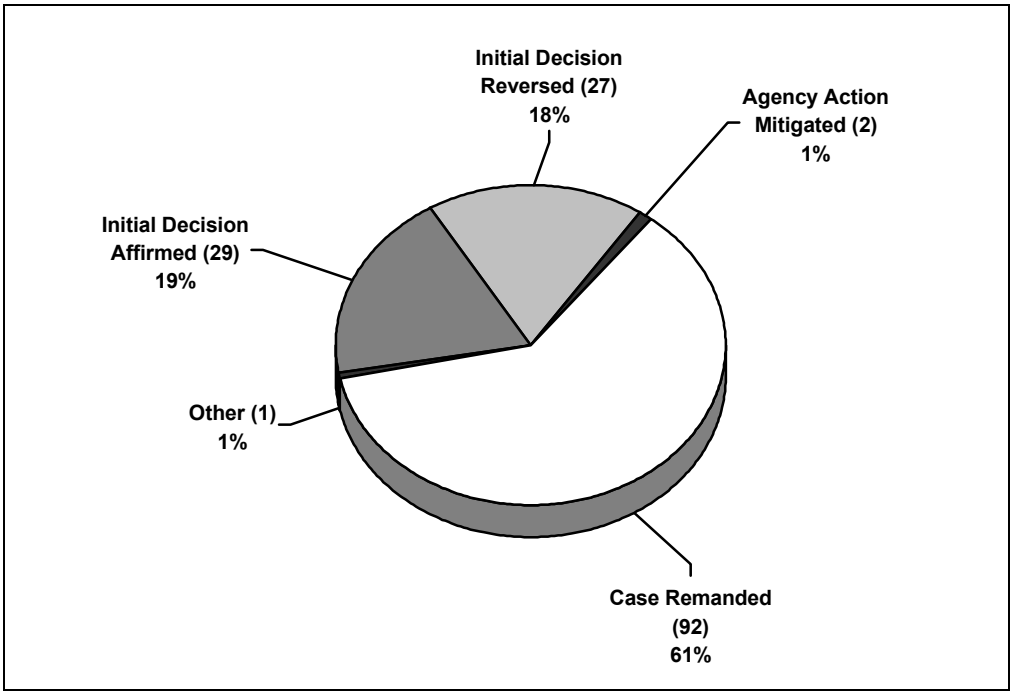
Type of Case	Decided	Dismissed		Settled		Denied		Denied/Reopened		Granted	
Adverse Action by Agency	485	29	6.0%	10	2.1%	355	73.2%	26	5.4%	65	13.4%
Termination of Probationers	41	1	2.4%	1	2.4%	38	92.7%	1	2.4%	0	.0%
Reduction in Force	44	0	.0%	1	2.3%	23	52.3%	2	4.6%	18	40.9%
Performance	17	3	17.7%	0	.0%	8	47.1%	2	11.8%	4	23.5%
Acceptable Level of Competence (WIGI)	5	1	20.0%	0	.0%	2	40.0%	1	20.0%	1	20.0%
Suitability	15	0	.0%	1	6.7%	11	73.3%	0	.0%	3	20.0%
CSRS Retirement: Legal	132	5	3.8%	2	1.5%	110	83.3%	8	6.1%	7	5.3%
CSRS Retirement: Disability	54	2	3.7%	1	1.9%	42	77.8%	2	3.7%	7	13.0%
CSRS Retirement: Overpayment	15	4	26.7%	0	.0%	7	46.7%	0	.0%	4	26.7%
FERS Retirement	98	6	6.1%	6	6.1%	66	67.4%	8	8.2%	12	12.2%
Individual Right of Action	87	1	1.2%	1	1.2%	64	73.6%	7	8.1%	14	16.1%
Other	138	7	5.1%	2	1.5%	98	71.0%	15	10.9%	16	11.6%
Total	**1131**	**59**	**5.2%**	**25**	**2.2%**	**842**	**72.9%**	**72**	**6.4%**	**151**	**13.4%**

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DECIDED IN FY 2001



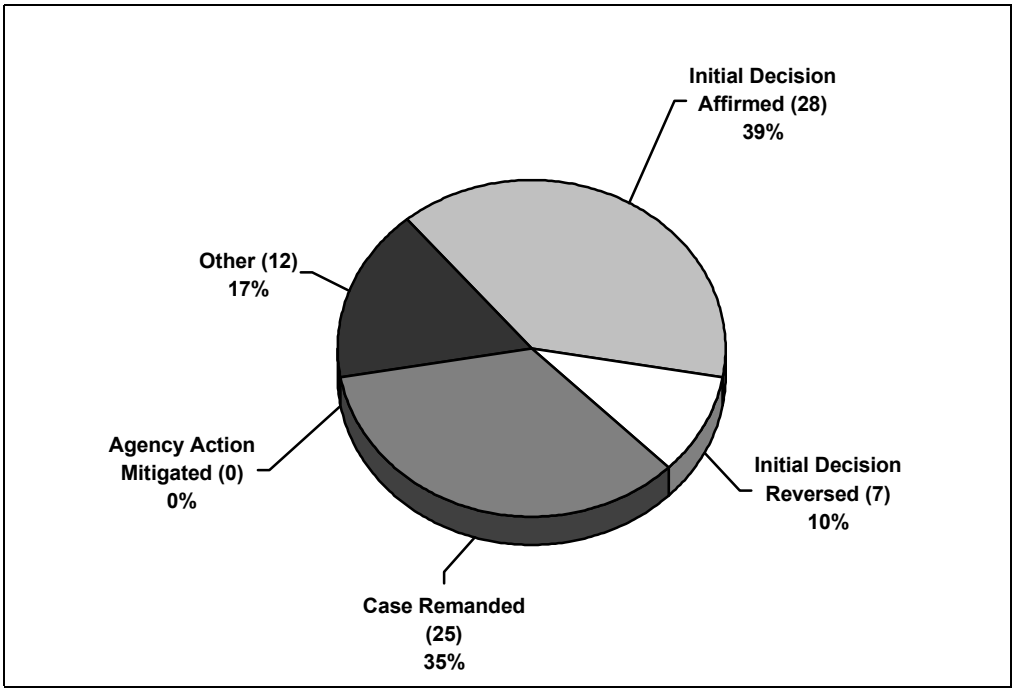
Total Number of Petitions for Review: 1,131

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS GRANTED IN FY 2001



Based on 151 Petitions for Review Granted

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DENIED BUT REOPENED IN FY 2001



Based on 72 Petitions for Review Denied But Reopened
(Percentages do not total 100% because of rounding)

PETITIONS FOR REVIEW DECIDED IN FY 2001 BY AGENCY

	Decided	Dismissed		Settled		Denied		Denied/Reopened		Granted	
OPM*	320	15	4.7%	9	2.8%	248	77.5%	17	5.3%	31	9.7%
Postal Service	219	11	5.0%	7	3.2%	149	68.0%	16	7.3%	36	16.4%
Army	78	3	3.9%	0	.0%	59	75.6%	4	5.1%	12	15.4%
Navy	77	2	2.6%	2	2.6%	54	70.1%	6	7.8%	13	16.9%
Justice	66	0	.0%	1	1.5%	50	75.8%	4	6.1%	11	16.7%
Veterans Affairs	64	1	1.6%	1	1.6%	50	78.1%	4	6.3%	8	12.5%
Treasury	52	3	5.8%	2	3.9%	31	59.6%	2	3.9%	14	26.9%
Defense	49	5	10.2%	0	.0%	36	73.5%	7	14.3%	1	2.0%
Air Force	48	1	2.1%	1	2.1%	38	79.2%	2	4.2%	6	12.5%
Interior	24	2	8.3%	0	.0%	17	70.8%	1	4.2%	4	16.7%
Agriculture	21	1	4.8%	0	.0%	15	71.4%	2	9.5%	3	14.3%
Transportation	17	1	5.9%	1	5.9%	10	58.8%	2	11.8%	3	17.7%
Social Security	14	2	14.3%	0	.0%	8	57.1%	1	7.1%	3	21.4%
HHS	13	1	7.7%	0	.0%	9	69.2%	1	7.7%	2	15.4%
GSA	10	3	30.0%	0	.0%	7	70.0%	0	.0%	0	.0%
Labor	7	2	28.6%	0	.0%	5	71.4%	0	.0%	0	.0%
Commerce	6	0	.0%	1	16.7%	5	83.3%	0	.0%	0	.0%
EPA	5	0	.0%	0	.0%	4	80.0%	0	.0%	1	20.0%
FEMA	5	0	.0%	0	.0%	5	100.0%	0	.0%	0	.0%
Nat'l Credit Union Adm	5	1	20.0%	0	.0%	4	80.0%	0	.0%	0	.0%
Energy	4	0	.0%	0	.0%	2	50.0%	0	.0%	2	50.0%
TVA	4	0	.0%	0	.0%	4	100.0%	0	.0%	0	.0%
HUD	3	0	.0%	0	.0%	2	66.7%	1	33.3%	0	.0%
FDIC	2	0	.0%	0	.0%	1	50.0%	0	.0%	1	50.0%
GPO	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%
NARA	2	2	100.0%	0	.0%	0	.0%	0	.0%	0	.0%
Other	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%
SBA	2	2	100.0%	0	.0%	0	.0%	0	.0%	0	.0%
Smithsonian	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%
Soldier's and Airmen's Home	2	1	50.0%	0	.0%	1	50.0%	0	.0%	0	.0%
CIA	1	0	.0%	0	.0%	0	.0%	1	100.0%	0	.0%
State	1	0	.0%	0	.0%	0	.0%	1	100.0%	0	.0%
Export Import Bank	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Nat'l Transportation Safety Board	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Railroad Retirement Bd	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
US International Development Agency	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
TOTAL	**1131**	**59**	**5.2%**	**25**	**2.2%**	**824**	**72.9%**	**72**	**6.4%**	**151**	**13.4%**

*Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Merit Systems Studies

The following are summaries of the findings and recommendations from the Board's merit systems studies that were released in FY 2001. The report on the Presidential Management Intern Program was submitted to the President and Congress in February 2001, while certain findings from the Merit Principles Survey were released through the *Issues of Merit* newsletter in preparation for a major report to be released in FY 2002.

Growing Leaders: The Presidential Management Intern Program

In light of the projected retirement of many of the Government's supervisors and managers within the next ten years, it is critical that the Federal civil service be able to attract men and women of exceptional management potential. In this context, the Board conducted a study of the effectiveness of the Presidential Management Intern (PMI) Program as a means to attract and develop the Federal sector's future managers.

The PMI Program was established in 1977 as a means of attracting master's graduates in public sector management to careers in Federal service. PMIs perform a 2-year internship in the excepted service, coming in at the GS-9 grade level, and normally being promoted to GS-11 after successful completion of their first year. PMIs who perform successfully can be given career or career-conditional appointments in the competitive service at the end of the 2-year program, and typically are, at that time, eligible for promotion to the GS-12 level.

Based upon a review of program operations, surveys of PMIs, and interviews with people associated with the development and administration of the program, the study concluded that, overall, the PMI program has met with considerable success in attracting high quality, high potential individuals to the Federal service. Despite the fact that the PMI program nearly disappeared following the downsizing of the Office of Personnel Management in the early 1990s, OPM's PMI program office has done an excellent job of revitalizing the program.

The surveys revealed that the majority of supervisors and managers who have hired PMIs through the program gave their interns' abilities high marks and report that they are very likely to use the program again. The track record of the interns also points to their success—more PMIs advance into management ranks than non-PMI employees. Although some concerns have been raised about the high turnover rate of PMIs, turnover data reviewed in the study show that PMI turnover is actually about the same as that of other comparable Federal employees. As with other comparable employees, PMI turnover occurs in the early years of employment.

Although the PMI program has proven to be an extremely effective method for hiring highly qualified individuals for the Federal service, the study found a troubling drift from the

purpose of the program as outlined in the executive order that governs it. Despite its origins as a management potential program, and subsequent executive orders that reinforced its management focus, the PMI program today is not universally viewed as a vehicle to hire and train the Government's future managers. Many agencies use the program merely as a mode of entry into the Government's professional and administrative ranks rather than as a tool specifically intended to hire future public sector managers.

The report also expresses concern about the fact that OPM has not yet demonstrated the validity of the PMI assessment center process, which is a fairly resource-intensive aspect of the selection process. Although an assessment center has been used to evaluate PMI nominees for a number of years, studies to determine the validity and reliability of the process were not undertaken until recently. Additionally, there is no objective evidence available to demonstrate that the resources the Government expends on the assessment center are in proportion to the value it adds to the selection process. It is critical that OPM ensure the reliability, validity, efficiency, and cost effectiveness of its assessment center process.

Also of concern is the fact that the training and developmental activities provided to PMIs sometimes fall short of the program's objectives. Although PMIs are supposed to receive a minimum of 80 hours of training per year, survey results reveal that in a significant minority of cases this does not occur. While Career Development Groups (CDGs) have been successful as a vehicle for networking, the study found them to have been less successful in helping PMIs reach other internship goals.

Based on these findings, the report recommended that OPM direct agencies' and its own focus towards the stated purpose of the PMI program so that all parties understand its special objectives of identifying future managers and providing them developmental opportunities. The report also recommended that OPM continue its work to demonstrate the reliability, validity, efficiency, and cost-effectiveness of the assessment center process for the PMI program. Because the study found that many interns are not getting the training and developmental assignments intended by the program, the report recommended that OPM work with agencies to improve PMI training, and either strengthen the Career Development Group component of the program or allow the groups to focus solely on networking. And finally, the report recommended that OPM ensure that prospective candidates for the PMI program fully understand the level of work they are likely to be assigned during and after the internships, and the extent to which they are responsible for their own advancement.

Merit Principles Survey 2000 (Findings released through *Issues of Merit*)

The Board periodically conducts surveys to obtain the views of Federal employees on a number of workplace issues such as working conditions, job satisfaction, and the quality of coworkers and supervisors. The Merit Principles Survey 2000 was the sixth in this series

since the Board's creation in 1979. A number of the findings from this survey were released during FY 2001 in the newsletter, *Issues of Merit*. Among the findings addressed in this manner were the following:

Performance appraisal. The results of the survey, which collected the views of thousands of Federal employees, indicated that only one out of every five believes that the performance appraisal system helped them do a better job. Moreover, only 20 percent think that the system helped increase job-related communications between them and their supervisors. Similarly, research indicates that there is considerable dissatisfaction with performance appraisal systems in both the private and the Federal sectors. For example, a 1995 study found that more than half the private companies surveyed were unhappy with their appraisal systems. The performance appraisal process, however, is only one aspect of performance management. It is equally important for Federal agencies to define what they are supposed to accomplish and understand what each worker contributes to those objectives; ensure that employees and customers buy into the organization's goals; provide frequent feedback on results; and select and develop good managers who can make the appraisal system work.

Unfortunately, the results from the Merit Principles Survey 2000 also suggest that Federal employees believe that feedback is not used as effectively as it might be. Over half of the nearly 7,000 employees who responded to the survey said that they receive informal recognition from their supervisors, but only 37 percent said that they are satisfied with the recognition they received. Only 33 percent said that recognition and rewards in their work unit were based on merit. Survey respondents also cited lack of recognition among the top five most important reasons to look for another job in the coming year.

Federal employees and GPRA. The success of the Government Performance and Results Act (GPRA) depends on employees at all levels of an organization understanding how their work contributes to meeting the agency's overall goals. Agencies must foster this understanding by setting employee performance expectations that are clearly linked to the agency's strategic plan and performance goals. However, in responding to the Merit Principles Survey 2000, only 55 percent of employees reported that their performance standards were clearly linked to their organizations' goals, and only 31 percent were even familiar with GPRA. On the other hand, when asked to rate the extent to which they believe their work contributes to their agencies' mission, survey respondents gave an average rating of 7.69 on a 10-point scale (with 10 being "contributing to a great extent"). This suggests that while some Federal workers do appreciate how their work fits into organizational goals, agencies should strengthen this connection.

Federal workers rate themselves. According to the survey results, Federal employees believe that the quality of the work performed in their units is outstanding or above average. Some 67 percent of respondents (the same percentage as in the 1996 survey) responded that way. The challenge is to

maintain a high performance level as large numbers of employees retire and less experienced workers replace them.

Actions against whistleblowers. In spite of the many changes in agency leadership, laws and regulations, and workforce composition—all of which contribute to turmoil in the workplace—Federal workers' perceptions about retaliation because of whistleblowing did not change during the 1990s. The Merit Principles Survey 2000 asked respondents whether they had experienced retaliation for a number of protected activities (e.g., whistle-blowing, exercising a right of appeal, reporting sexual harassment). In the 1992, 1996 and 2000 surveys, the percentage of employees who had experienced retaliation remained low. The range in 2000 was from 1 percent (those who reported sexual harassment) to 9 percent (those who exercised an appeal, complaint, or grievance right).

Job satisfaction. Federal employee job satisfaction declined slightly, according to data collected for the Merit Principles Survey 2000. Although the percentage of employees who were generally satisfied with their jobs decreased only from 71 to 67 percent between 1996 and 2000, several areas related to job satisfaction also showed a similar decline. This included the declines in the percentages of employees who said that they would recommend the Government as a place to work, that the work they do is meaningful, and that there is a spirit of cooperation in their work units.

Reasons retirement eligibles leave. Effective workforce planning includes knowing how many retirement-eligible employees actually intend to retire. In the Merit Principles Survey 2000, participants were asked about their retirement intentions. The most frequently cited reason in employees' decisions to retire was non-work interests. Other important reasons were excessive job stress and a desire to work on one's own.

Issues of Merit

The Board published four editions of its newsletter, *Issues of Merit*, in FY 2001. Among the other topics addressed were:

The Federal hiring process. A series of focus groups were conducted in Baltimore, Philadelphia, Chicago, and New York, where MSPB staff members discussed with managers and senior executives their views about Federal hiring tools and hiring processes. These managers generally agreed that they should be involved in recruitment long before the final selection stage is reached. They also expressed dissatisfaction with the assessment tools used to identify candidates for referral, noting that too many marginally qualified or even unqualified individuals are referred for employment.

Presidential management intern demographics. A review of the Presidential Management Intern Program showed that women are very well represented in this selective program for identifying and developing managerial talent. The percentage of women hired yearly into the program has been as high as 68 percent and never below 47 percent. This is not because the program favors women, but rather reflects female representation among

master's graduates, particularly in the field of public administration. Similarly, minority groups are well represented in the program: 23 percent of PMI hires in 1999 were minority candidates.

Poor performers. Focusing on finding ways to fire more employees misses the important connection between how the Government hires and the need to fire. Poor performers can, in a sense, be created when agencies use selection practices that do a poor job of matching job requirements to the qualifications of the applicant, or when recruiting efforts are inadequate, or when management is unwilling to devote the time and resources that are necessary to find and evaluate the best candidates. In addition, compensation, training opportunities, and performance management can all play a role in whether or not good people are attracted to and hired by Federal agencies. To develop a real understanding of the issue of poor performance, it must be viewed within this larger context.

Cost of the merit promotion process. The Board estimated that merit promotion costs the Government about $238 million per year, including conducting job analyses, developing crediting plans, rating job applications, and interviewing applicants.

Probationary period. The probationary period is an important phase of the assessment process. It becomes particularly important during periods of full employment, when selecting officials may have fewer candidates from whom to choose and, consequently, do not believe that it is practical to assess job applicants much beyond the point of establishing basic qualifications. When selections are made in the absence of rigorous assessment, using the probationary period wisely becomes even more important. This tool stands as a final protection against poor selections made under difficult hiring conditions.

Source of Federal job selectees. Information obtained for the Board's study of the Federal merit promotion process confirmed that many selections were of individuals who already worked for the selecting official's organization. The next largest source of appointees was not candidates from other agencies, but applicants from outside the Government. The study data also indicated that during the preceding two years, some 54 percent of the time, selecting officials had already identified a current employee whom they were likely to promote into the vacancy.

Use of retention allowances. The Board examined OPM statistics on what kinds of jobs were held by employees who received retention allowances. In 2000, the Federal Government paid over 3,000 employees an average of more than $8,000 each to remain on the job. Six of the top 10 occupations whose workers received such bonuses were in medical and health care fields. Others were computer specialists, police officers, and financial institution examiners.

Special Issues of Merit. To coincide with the beginning of a new presidential administration, the Board published a special edition of *Issues of Merit* which highlighted excerpts from—and updates of—previous newsletter articles that best captured the significant human resources issues examined by the Board during the

preceding five years. That edition covered human resources flexibilities available to agencies; the need to continue to monitor and protect the merit system principles; the need for better employee selection tools; handling poor performers; the public service orientation of Federal employees; and the fact that the Government's "Rule of Three" may be preventing, rather than assuring, consideration of the best available candidates.

FY 2001 Financial Summary

(Dollars in thousands)

FINANCIAL SOURCES	
Appropriations	$29,372
Civil Service Retirement and Disability Trust Fund	2,430
Reimbursements	135
Total Revenue	**$31,937**
OBLIGATIONS INCURRED	
Personnel Compensation	$19,593
Personnel Benefits	$3,740
Benefits, Former Employees	0
Travel of Persons	499
Transportation of Things	32
Rental Payments	2,566
Communications, Utilities, and Miscellaneous Charges	577
Printing and Reproduction	99
Other Services	3,841
Supplies and Materials	322
Equipment	588
Total Obligations Incurred	**$31,857**
Obligated Balance	**$80**

For Additional Information

The MSPB World Wide Web site contains information about the Board and its functions, where to file an appeal, and how the Board's adjudicatory process works.

At the Web site, you can get Board regulations, appeal and PFR forms (which can be either printed or filled in using a PC), important telephone and FAX numbers, and e-mail addresses for the headquarters, regional, and field offices.

Complete decisions from July 1, 1994, are available for downloading. The Board is in the process of adding significant precedential decisions issued from 1979 to 1994 to the decisions database. The Web site also provides weekly Case Summaries—an easy way to keep up with changes in Board case law.

From the Web site, you can download recent Board reports and special studies on civil service issues.

You can also subscribe to one of two list servers (listservs) on the Web site—one to receive Board decisions as they are posted, and the other to receive notification when a merit systems studies report is issued.

The Board's Web site is **http://www.mspb.gov**.

The Board's toll-free telephone number is **1-800-209-8960**.